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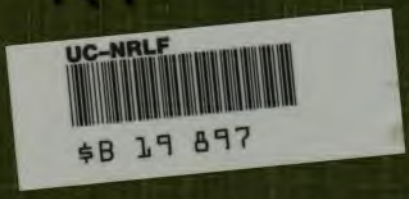

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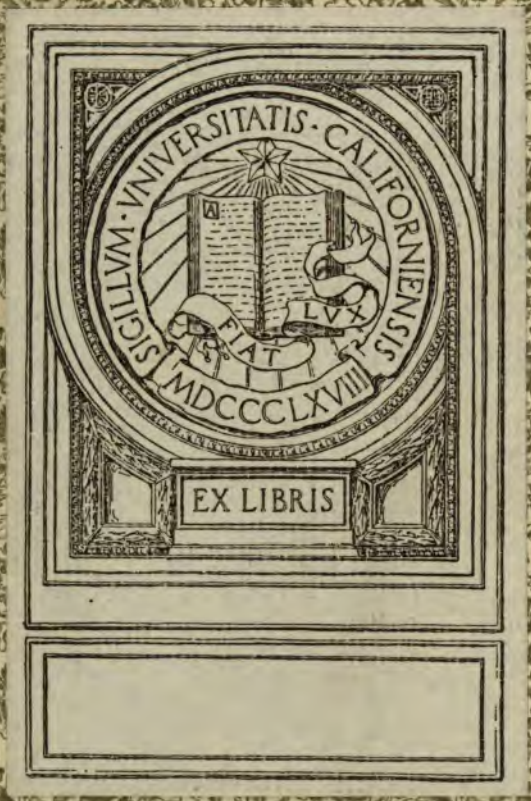
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THE THEORY OF STATE SUCCESSION.

TO
MY MOTHER.

THE

THEORY OF STATE SUCCESSION

WITH SPECIAL REFERENCE TO

ENGLISH AND COLONIAL LAW.

BY

ARTHUR BERRIEDALE KEITH,

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PREFACE.

THIS Essay on "State Succession, with special Reference to English and Colonial Law," was for the most part written in December, 1905, and was presented in June, 1906, by permission of the Regius Professor of Civil Law, as a dissertation for the degree of D.C.L. at Oxford. It has received the approval of the Board of the Faculty of Law.

The Essay is now printed practically in the form in which it was submitted to the Board, but advantage has been taken of some criticisms kindly made by Professor T. E. Holland, K.C., to alter the wording of several passages in order to present more clearly the theory maintained.

I am indebted to my brother, W. J. Keith, M.A., I.C.S., of the Burma Commission, for information regarding the taking over of Upper Burma and for other help.

A. BERRIEDALE KEITH.

LONDON,
April, 1907.

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UNIV. OF CALIFORNIA

THE THEORY OF STATE SUCCESSION, WITH SPECIAL REFERENCE TO ENGLISH AND COLONIAL LAW.

CHAPTER I.

THE LEADING THEORIES OF STATE SUCCESSION.

THE cases in which there arises, or appears to arise, a transfer of the rights and obligations of one state to another may be classified on one or other of two principles. The main distinction may be drawn between (1) the transfer of a part of one state to another state, whether as the result of bare conquest, rebellion or cession, and (2) the absorption of a whole state into another state, whether by bare conquest or by self-cession. In the former case there remain two states of International Law between whom the obligations of the ceded territory or the conquered province must be shared; in the latter, one state must in some way sustain a double personality. But important as this distinction is, it is, in our view, for reasons which will be further developed in Chapter II., better to accept as the fundamental division that between (1) cases of cession and (2) cases of conquest, thus distinguishing the instances, not on the basis of the extent to which the state is affected by the change, but on the basis of the mode in which the change comes about, by agreement or by force. Under the first of these two heads fall cases of incorporation in a federal union; under the second, cases where a part of a state rebels and finally wins recognition as a separate state without the conclusion of any treaty with the parent state. Each of these heads, cession and conquest, may be sub-divided on the principle first proposed of completeness or partiality.

As is natural, it is customary to treat both sets of cases as falling under the same law. It is true that such an attempt has to meet obvious difficulties. At first sight nothing can be more disparate than cession and conquest. In the former the terms of settlement are drawn up by mutual consent, while in the latter the settlement is left to the victor's pleasure. In the former case there is a contract of the most solemn kind known to International Law, any violation of which gives to the other party the right of diplomatic action or of war on a just *casus belli*. Even in the extreme instance of a complete self-cession the contract of cession remains binding under International Law, and would afford just ground for interference by foreign powers. On the other hand, even if a conqueror after annexation were to offer favourable terms to those of his opponents in the annexed territory who still resisted on condition of their abandoning their resistance, he would not be bound in the eyes of International Law, which recognises only sovereign states as parties capable of contracting. So Russia consistently declined to permit any right of diplomatic representation with regard to her engagements towards Poland after 1815, and it may safely be said that no foreign power would have felt itself justified in criticising diplomatically the action taken by His Majesty's Government in carrying out the articles of peace which terminated the war with the South African Republic and the Orange Free State.

Despite these patent differences between the two cases the writers on International Law, as a rule, proceed to assume that there must be some common basis

on which the facts can be dealt with, and this basis they find by subsuming all the instances under the head succession, and by determining the content of this conception by generalisations from the conditions usually contained in treaties of cession. The principles thus attained, they apply, in the first instance, to cases of cession where there is omitted, by accident or otherwise, some point usually provided for in such treaties, and then by a far bolder stretch to cases of pure conquest.

On the face of it this is a distinctly arbitrary proceeding, but it is rendered plausible by the peculiar value attributed by some of the leading continental authorities on International Law to treaties as determining the nature of such law. This view is conclusively combated by Hall (*International Law*, pp 7–12), and it does not seem possible seriously to maintain it. It may be argued, with at least equal plausibility, that stipulations in treaties are inserted to oust the application of the ordinary rules of International Law, and, as will be seen throughout this discussion, the stipulations actually inserted in treaties of cession are of so varied a nature, and differ in so many points of principle as well as of detail, that it would be quite impracticable to construct from them any consistent or harmonious body of doctrine.

Indeed, even in the case most favourable for this line of argument—that is, where a treaty of cession is silent on some point usually dealt with in such treaties—we shall find reason to believe that the common law of annexation and not a law derived from the comparison of treaty stipulations is the principle which is, in fact, applied by states in determining their action. Nor is this in any way unnatural, for the essence of cession is the total abandonment by the ceding power of its sovereign rights over the ceded lands, and *à priori* all the incidents of conquest must attach unless the treaty expressly exempts them. Cases of cession stand, therefore, on the same footing as cases of conquest, and it remains to be seen how far the results obtained on an examination of treaties of cession can be applied to cases of annexation.

The answer to this question depends on the content of the conception of succession. The question is whether succession denotes substitution or change merely or substitution with continuity, whether the state maintains in some sort a personality despite the change or whether a new personality in nowise connected with the old personality comes into being. The view prevalent among jurists, both on the Continent and in England, is that succession involves continuation. The origin of the idea belongs to the earliest period of International Law. As the state was regarded as a person, it was an obvious and indeed an inevitable step to go further and identify the conqueror of the state to which the cession was made as succeeding to the *universum jus* on the analogy of the heir in Roman Law. For example, Grotius (Book ii., Chapter IX., sec. 12) says: "*Hæredis personam quoad dominii tam publici quam privati continuationem pro eadem censeri cum defuncti persona, certi est juris*," and again (Book iii., Chapter VIII., sec. 2): "*Potest imperium victoria acquiri, ut est in rege alio imperante, et tunc in ejus jus succeditur.*" It should be noted, however, that Grotius does not carry out to its logical conclusion the doctrine which he here enunciates. He recognises (Book iii., Chapter VIII.) the right of a state to conquer another, and that the property of conquered states falls to the victor, including incorporeal rights, but he never asserts that the conqueror is saddled with any of the obligations of the conquered. On the contrary, he approves the view that all things belonging to the conquered become the property of the conqueror, and that it is for the conqueror to decide what the conquered may keep and what he must forfeit. But whatever Grotius' view was, the analogy to the Roman heir was carried out more logically by his successors. Heffter (*Das europäische Völkerrecht*, para. 178) distinctly recognises it, and Bluntschli (*Droit international*, para. 54) declares that both rights and obligations of extinguished states pass to the successor. Halleck (*International Law*, ii., 495) says: "Complete conquest, by whatever mode it may be perfected, carries with it all the

rights of the former Government, or, in other words, the conqueror by completion of his conquest becomes, as it were, the heir and universal successor of the defunct or extinguished state." Hall (p. 99) says: "When a state ceases to exist by absorption in another state, the latter in the same way is the inheritor of all local rights, obligations and property." Similarly, he holds (p. 92) that when a new state is formed out of an old one the new state has the rights which attached by treaty to its local limits, and is saddled with local obligations such as that to regulate the channel of a river, and local debts, whether they be debts contracted for a local object or secured on local revenues, are binding upon it. Phillimore (*International Law*, iii., 814) expressly adopts the view that the succeeding state is in the position of a Roman heir, and this view is also found in most manuals on International Law.

This view, however, despite the weight of the authority in its favour, cannot, it is submitted, stand examination. According to Sohm's *Institutes* (E. T., ed. 2, p. 526) the heir succeeded to the personality of the deceased. He took all his rights, but became liable for all his debts to the full extent, not only of the inherited property, but to the extent of his own means. But it cannot seriously be contended that this is the position of a state which succeeds, for, in the first place, the state does not succeed to the personality of the former state. This is sufficiently proved by the fact that it has never been held that the successor is bound by treaties of a personal nature, such as treaties of alliance or guarantee. In fact, as Huber points out (*Die Staatensuccession*, p. 18), the state succeeds to the rights and liabilities as its own. The personality of the former state disappears absolutely, and what is succeeded to is not the personality but the "jura." The successor of International Law steps into the rights and obligations of the predecessor as though they were his own. In the second place, the conception of an heir in the early Roman Law was that of a person who had to be heir whether he wished to be so or not, and it has been conjectured that really the heir was *ab initio* a co-owner. Whatever the truth of this doctrine,—and it raises, of course, the question still open to dispute,—whether a collective or an individual ownership is the earlier (*cf.* Pollock and Maitland, *History of English Law*, Book ii., Chapter V., with Vinogradoff, *Doomsday-book*, p. 13, and my note in the *Journal of the African Society*, January, 1907), yet there can be no doubt that the successor in International Law is quite different; whether he conquers or obtains by cession, he succeeds through an act of his own will.

These differences have given rise to another theory which appears as early as Cocceijus in his Commentary on Grotius, quoted in Huber (p. 191, n. 42): "*Negamus in successionibus regnorum successoris personam pro eadem censeri cum persona defuncti.*" A new personality takes over all the rights and obligations of its predecessor. This view has been developed with great force by Huber, and is accepted in a modified form by Westlake (*International Law*, Part I., p. 69). It may be interesting to compare it as modified with the universal succession mentioned by Sohm (p. 526) as an alternative possibility to the universal succession of Roman private law. He points out that admitting that the heir succeeds to all the rights and liabilities of the deceased, yet he may succeed to them only in such a manner that his liability for the obligations of the deceased shall be limited by the amount of the assets he has received from him. That is to say, he does not take over the personality of the deceased. He takes over a bundle of rights and obligations which he deals with as he likes, on the understanding that as far as the assets go he must meet the liabilities, and no further. The advantages of this modification of the doctrine (*cf.* p. 70) are striking, as it enables its supporters to escape the difficulty which confronts Huber's form of the theory that a state which had been driven to annex another state which by reason of its bankruptcy was unable to maintain order in its own territories, and so was a menace to neighbouring powers, might find itself forced to discharge the

indebtedness of the bankrupt community. As, moreover, the state no longer is regarded as assuming the personality of its predecessor, no difficulty need be found in explaining why the treaties of the latter state are not binding on the conqueror.

There are two other leading theories which are more or less based on the idea of continuity in succession. The first is that of Gabba (*Quistioni di diritto civile*, Part X.), who distinguishes two personalities in the state, one political and one social. The territory and the men who occupy it are inseparably connected, and form a permanent social personality despite the alteration of the political personality of the state. The main merit of this theory is that it furnishes an explanation, at once simple and elegant, of the obligation of a state to recognise the public debts of a conquered territory, but it must be regarded as open to fatal objections on theoretical grounds. For though it is the social personality which explains the taking over of the obligations, yet, as a matter of fact, it is the political personality which determines that the obligation shall be met, and, however attractive the theory is at first sight, it really does no more than set the difficulty one step further back, for the question remains, Why should the political personality recognise an obligation to which, *ex hypothesi*, it is indifferent?

The second of these theories is that of Appleton (*Des effets des annexions de territoires sur les dettes de l'état démembré ou annexé et sur celles des provinces, départements, etc., annexés*), who calls in the analogy of the Roman *arrogatio*. The conquered state suffers a *capitis diminutio*, but though it ceases to be a state it still has obligations and rights. But Huber has satisfactorily disposed of this theory by pointing out that it attributes a right to the community which is inconsistent with conquest. A conquered state has no right to become a province. It requires for that purpose a legislative act on the part of the conqueror before whom it has no rights whatever.

There can therefore be little doubt but that Huber's theory of succession represents the strongest and most convincing form in which that doctrine can be put forward, and its practical acceptance, as modified, by Westlake, adds very greatly to its weight. It seems to me, however, that there exists grave doubts whether the theory of the passing over of rights and obligations together can be maintained. We may first take the case of cession as being the more favourable to Huber's theory, and consider a theoretical case—viz., in which a state should cede absolutely, and without any reservations whatever, a province to another state. What would be the position of that state with regard to the obligations of the ceded portion? Hall (p. 99) says that it carries over to the state which it enters the local obligations by which it would under such circumstances (*i.e.*, independence) have been bound, and the local rights and property which it would have enjoyed. The latter part of the statement may be accepted without hesitation, and we may concede that for reasons of expediency, not necessarily connected with succession in any way, local servitudes of passage, etc., in favour of other states might be recognised by the state to which the cession was made. But can it be contended that the state receiving the cession would be bound to bear the burden of debts secured on local revenues? I do not think that this can fairly be held. The fact that the debt is secured on local revenues is not really relevant. The debt is a debt of the cessionary state, and the creditors can look to it for payment. The fact that it has lost the revenues whereby it used to make the payment is a misfortune of war. This view receives the strongest support from the action of the United States Commissioners in negotiating the Treaty of Paris in 1898 which terminated the war with Spain. The Spanish Government endeavoured to persuade the United States to admit all loans raised by Spain on hypothecation of Cuban domain or Cuban revenues, but the United States refused to admit that they were bound by any such principle, or that any such principle existed in International

Law. The Spanish Commissioners cited several treaties in support of their contention, but the United States Commissioners refused to be bound by special treaties between individual states. The Spanish Government was compelled to give in, and if treaties are considered as precedents the latest and most authoritative precedent is in favour of there being no obligation on a state to recognise the debt raised on the security of the local revenues of a territory ceded to it. But if this be admitted we are driven to the conclusion that, in the case of cession, rights only, and not obligations, pass unless it is otherwise specially provided. The fact that most treaties provide that the state shall take over all the rights and obligations with regard to the ceded territory, on certain conditions, produces much the same result as if there were a true universal succession, and it is in this fact that we must trace the origin of the doctrine of state succession as it appears in the Jurists. But the fact remains that a contractual agreement for the purpose of creating a quasi-universal succession affords no justification for assuming a universal succession in cases where no contract can or does exist. It is submitted that cession, in itself, creates only a singular succession (*cf.* Sohm, p. 527), that is, a succession to rights and not to liabilities, and that it is only by contract that a universal succession in such cases arises. Such contracts can afford no satisfactory ground on which to base a theory of the results of annexation, and in any case in which the terms of the contract are not explicit the principle on which the question should be judged is that of a succession to rights and not to liabilities. Such a succession is really merely a substitution without any continuity. The rights obtain a new master and cease to be related to the obligations with which they were formerly allied, and there is no unity to enjoy a continuous existence.

If the doctrine of continuity of succession is not applicable even to a case of cession it is much less so to a case of annexation. It may be as well here to point out that there is no analogy between a case of a change of government by revolution in a state and a change of government by annexation. In the former case International Law is based on the doctrine, without which, indeed, it is hard to conceive the possibility of the existence of a system of International Law, that the personality of a state is not affected by internal changes. On the other hand, it is obvious (on any conceivable theory) that the personality of a state is very much altered by annexation. It is impossible, therefore, to argue, as Calvo does (*Le Droit international*, ed. 4, i., 248), from the continuance of the personality in revolution to the continuance of the personality in annexation, but there can be little doubt that this argument has had much to do with the acceptance of the theory of state succession as a continuance in some form of a personality. But what are the facts? Another power attacks a state, defeats its armed force, occupies its seat of Government, appropriates its revenue, annexes it, counts its citizens as its nationals, and legislates for it. What takes place is a substitution of authority; there is a break with the past. The state seizes whatever thing of value it can obtain, but it certainly did not conduct the war for the sake of assuming onerous obligations. The right of conquest is fully recognised by International Law. On the other hand, it may be argued that there is something approaching a consensus of writers that a conquering state should recognise the public debt of the territory annexed. There is also a similar consensus that the private rights of individuals against the Government should be protected by the new Government, but I do not think that either of these rules can be elevated into principles of International Law. In the case of the rights of individuals this does not seem open to dispute. It must be admitted that Governments have a discretion as to the recognition of claims of individuals against their predecessors, and even those countries in which International Law is held to be part of the law of the land would never, and have never, it may confidently be asserted, regarded a municipal law in contravention to this "principle" of International Law as being *ultra vires* the municipal legislature.

Nor can it, I think, be shown that in any case the courts of any country have permitted an action to be brought against the Government to declare it to be responsible for the debts of a country which it has conquered and annexed. It cannot, therefore, I think be held that these principles rank higher than maxims of international morality and expediency, which a Government can only disregard at its peril, but which cannot be said to be obligatory even in International Law. It is submitted that the true doctrine of International Law with regard to the annexation of states is that the annexing power seizes all the rights in the country which can be obtained by possession of the territory of the country and its material resources, but it does not succeed to the obligations of the conquered Government nor to such rights as were personal to that Government.

On this theory, it seems to me, all the incidents of annexation can conveniently be accounted for, bearing in mind that the expediency and ethical considerations, which cannot be without their weight on any Government, frequently render it advisable for the Government not to insist on the full measure of its legal rights. It is worth noting that the most uncompromising supporters of the doctrine of the continuity of state succession argue frequently on grounds purely of expediency and what is fair, and I think it possible to show that the theory proposed above will account for the actual state of facts with regard to annexations, while avoiding the logical incongruities attendant on the continuance theory and the illogical devices adopted to avoid these incongruities.

To apply the theory in brief to the main classes of facts in question:—

(i.) Treaties of the conquered state, which are still executory, being personal to that state as an individual which has now disappeared cease to be binding. There is a very doubtful exception in the case of so-called transitory treaties, which, so far as it can be considered genuine, can be explained on the ground of expediency (*see* p. 22).

(ii.) The political institutions and the administration of the country are completely altered. It is perfectly true that for convenience' sake it may be desirable to continue many of the officials in their offices, but their authority is derived from a new sovereign, and their past services are no protection against immediate dismissal. The authority of the previous Government is completely and absolutely departed, and acts done in virtue of that authority should not be recognised by any court. The courts now are altered, and administer the justice of the new sovereign, and even though the laws are unchanged they are no longer bound by the decisions of the previous courts.

(iii.) The conqueror succeeds to all the public dominions and generally to all public property of the conquered state.

(iv.) By the act of conquest all the subjects of the conquered become the subjects of the conqueror, to the exclusion, however, of such subjects as avoid the conquest, by leaving, before annexation takes place, the territory, and do not return to it. On the ordinary theory of state succession such subjects should become subjects, but it will be seen that this theory leads to great injustice. On the theory here put forward, however, as the conqueror has done nothing to obtain physical control over the persons who emigrate he is not their sovereign.

(v.) With regard to the rights of subjects and foreign nationals as against the Government distinctions must be made according to the nature of the right claimed: (*a*) If the right is one *in rem* it is treated as subsisting under the new Government, unless that Government alters it by legislation. This follows immediately from the theory, because in conquest the conqueror does not war against private property but against the state which he overthrows; the right exists, and is good against all the world as well as the sovereign, and there is no reason why a change of sovereign should alter the right. (*b*) If the right is *ex contractu* the case is different. The change of government destroys one of the parties to the contract, and therefore the contract falls utterly to the ground, leaving it

to the benevolence of the sovereign to deal out such relief to the parties on the other side as to it may seem fit. On the usual theory the State is regarded as a successor to the contracts of the territory annexed, but, owing to the absurdities which follow from a rigid adherence to this principle various illogical qualifications have to be made. (*c*) Obligations *ex delicto* clearly do not pass on our theory, and even on the theories based on the idea of succession the same rule is sometimes applied in accordance with the rule of Roman Law that delictual liabilities do not pass to the heir.

(vi.) With regard to the rights of individuals among themselves as opposed to their rights against the state no alteration is made by conquest on either theory, but there is a difference in the view taken by the two theories as to the rights of the conqueror to alter the laws affecting private matters. On the succession theory, strictly speaking, the system of private law should be maintained without alteration except in so far as changes in public law may affect it, and should only be altered on principles similar to those on which the predecessor would have altered it. On our theory there is no obligation on the conqueror to respect the existing law, save in so far as it may be expedient to do so, but as his mere conquest does not alter private law, his will must be expressed in some legislative shape to affect such change.

CHAPTER II.

THE VARIOUS FORMS OF STATE SUCCESSION.

IT is now necessary to examine in some detail the different forms in which state succession presents itself. Huber (pp. 26–40) gives an elaborate and logically developed division which it will be necessary to consider. He classifies the cases of state succession in the following manner :—

1.—*Partial Succession* :—

A 1. Cession.
A 2. Administrative Cession.
B. Independence.
1. Full Independence.
2. Vassaldom.
C. Entry into a Federal Union with Part of the State Territory.

2.—*Universal Succession* :—

(*a*) With one Successor.
A. Incorporation.
(i.) Complete Incorporation.
(ii.) Limited Incorporation.
(*b*) With several Successors.
B. Breaking up.
(i.) Complete Breaking up.
(ii.) Limited Breaking up.

But whatever the advantages of this elaborate system for the complete treatment of the subject it has the disadvantage of necessitating much repetition and endangers the clearness of the theory in a multitude of details. Nor does it appear to be really based on what is the most important principle of division. Even on Huber's own theory, which we have discussed in Chapter I., there is no fundamental difference between what he calls partial and universal succession. In both cases his theory is (p. 25) that of a "Gesamtnachfolge in ein Vermögen als ganzes," and the only important difference lies not in the mode of succession but in the extent of the rights succeeded to. In the case of universal succession these are all the rights of the predecessor, in the case of partial succession only certain rights; but this difference once borne in mind the rules of partial succession run parallel with those of universal succession, as Huber's account itself makes perfectly clear.

The principle of division which it is here preferred to follow is a different one. Accepting the theory that state succession is one and the same principle wherever it occurs, cases of state succession will be divided according as the question of the nature of the rules of state succession is left to be decided by the general principles of International Law or is regulated by treaty. The latter set of cases will be referred to as "cases of cession," using that term in a wide sense to include :—

(i.) Cases of cession proper where two contracting powers respectively cede and receive territory, and remain after the cession separate independent sovereign powers.

(ii.) Cases where one sovereign state recognises another as a sovereign state which has formed itself out of part of its territories and agrees to it possessing

its territories as its own. Such, for example, was the Bloemfontein Convention of 23rd February, 1854, recognising the independence of the Orange Free State. It is true that the treaty creates a new party, but the succession is precisely analogous to the succession of a cessionary in the ceded territory, and the important point is the treaty of cession.

(iii.) Here also must be reckoned cases where one power agrees with another for the absorption of the former by the latter; for example, the treaty of the 7th December, 1849, for the cession of Hohenzollern Sigmaringen and Hohenzollern Hechingen to Prussia (Hertslet, *Map of Europe by Treaty*, ii., 1117). Such treaties are sometimes said not to be real treaties, inasmuch as the extinction of the personality of the state prevents there being two parties to the contract (Westlake, i., 64). This seems, however, to be a logical fallacy, as in the statement made on page 63 that the voluntary extinction of a state by constitutional means is impossible. The state exists to contract, and its existence continues in the act of contracting, even though it perishes as the result of the contract. But though undoubtedly the disappearance of the state diminishes the sanction of the contract, inasmuch as there is no state to insist on the contract being carried out, still the contract is binding, not only morally but also legally, on the contracting party which remains, and as a matter of fact such contracts are observed with as much faith as other treaties, though like them they may grow obsolete with change of circumstance, and may be altered by the successor. It is not possible to say that the terms of union between Scotland and England do not form a binding contract, though in that case both parties have really disappeared, and yet the terms of that contract are liable to be altered, and are altered from time to time by the Imperial Parliament. Again, it is objected that the rights transferred by such treaties are rights regarding a whole state and not merely a part, but to this it may be replied that the difference is one of degree and not of kind.

These cases, however, form a transition to the cases of annexation or conquest, under which head may be classed:—

(i.) The ordinary cases of annexation, which, like them, show (*a*) a disappearance of one party, and (*b*) a succession to the whole State, but differ in the essential point of there being no treaty of cession. Under this head we would class also:—

(ii.) Cases where the one state seizes and maintains its hold on a portion of the territory of another, in which case both parties remain in existence and a succession to a part only of the state takes place. This case, though theoretically possible, is hardly found in modern International Law, though the Argentine Republic used to claim that Great Britain occupied this position with regard to them in connection with the holding of the Falkland Islands. Their recent legislation seems to abandon this claim by recognising the islands as foreign territory.

(iii.) Similar, too, would be the case of a revolted colony, or part of a state, which remains independent without a special treaty, as in the case of the South American Republics and Spain. Here, again, both parties remain independent, and there is only a part of the state to succeed to, but there is no treaty, and, though it is somewhat awkward to call these cases annexation, or even conquest, the term is logically appropriate, and will be used throughout for convenience (*cf.* Halleck, ii., 480, 481).

The distinction between cession and annexation or conquest is a difference in the title of the territory acquired, and the important result of such difference is that the terms are in the case of cession primarily regulated by the treaty, leaving only doubtful points to be settled by the general doctrine of International Law, which, on the other hand, regulates all questions regarding annexation or conquest. This opposition is nowhere recognised by Huber, who, on the contrary, bases his whole theory on one idea of state succession, which is, he holds, carried out in

treaties. The end of this topic of International Law consists, therefore, in developing, partly on general grounds of equity and partly on generalisations from treaties, rules for the incidents of state succession. The theory here supported, on the other hand, is based on generalisations from the practice in annexations by conquest without treaty in the first place, and only secondarily on treaties, which I consider, as often as not, contain precisely the opposite of what the rule of annexation would be, as is, indeed, to be expected, seeing that treaties of cession are used for the mitigation of the harshness of pure conquest. Further, what is still of more importance is that treaties do not cover the whole of the questions which arise, and, practically, it is necessary to supplement the theory derivable from treaties.

The view here taken, therefore, is that there is a common law of state succession, the evidence for which mainly exists in international practice, as evidenced in the administrative acts of governments and in the judicial decisions of their courts. Sometimes doctrines of this common law are embodied in treaties, but at least as often treaties introduce doctrines which are modifications of, or derogations from the strictness of the common law. It might, indeed, be argued that state succession should be considered as regulated by different and distinct laws in the case of conquest and of cession, and while the former would be governed by the common law, the latter, in cases where the treaty was not explicit, would be governed by a law deduced from treaties of cession only. The answer to this theory is, that the rule is not observed in practice. As we have seen, Huber extends the law which he derives from treaties to cases of conquest, and similarly when treaties are silent, governments insist on arguing from cases of conquest to cases of cession, holding, I think rightly, that the common law applies where the treaty is silent.

The examples of succession by cession, or by annexation or conquest, which I propose to quote are confined to the nineteenth and twentieth centuries, and mainly to the latter part of the period from 1815 onwards. Like the English law of trusts, at least before the Judicature Acts, International Law is a thing of rapid growth, and instances before 1800 are usually of little value. This is partly due to the alteration in the conception of the state, which is no longer regarded as the patrimony of the dynasty. It is also due in great measure to the increased value put on the rights of neutrals. But, even in the nineteenth century, the treaties and annexations prior to the European settlements of 1814 and 1815 are of little value, because the contracting parties—*e.g.*, Westphalia, Holland and the smaller German States—were not really independent states, but mere vassals of France, and it was not till the end of the Revolutionary period that Europe became divided into great national states. This applies with special force to the German Empire, which formally broke up in 1805.

Since 1815 the examples of cession of most importance for our purpose are the treaty of 10th November, 1859, for the cession of Lombardy by Austria to Sardinia; the treaty of 23rd August, 1860, for the cession of Savoy and Nice to France by Sardinia; the treaty of 2nd February, 1861, for the cession of Mentone and Roccabruna by Monaco to France; the treaty of 30th October, 1864, for the cession of Schleswig-Holstein by Denmark; the treaty of 3rd October, 1866, for the cession of Venetia by Austria to Sardinia; the treaty of 1867, for the cession of Alaska to the United States of America; the treaties of 10th May, 1871, and of 11th December, 1871, for the cession of Alsace-Lorraine by France to Germany; the treaty of 1st July, 1890, for the cession of Heligoland by Great Britain to Germany in return for certain territories in Africa; the treaty of 10th December, 1898, for the cession of Cuba, the Phillipines, and Puerto Rico by Spain to the United States; the treaty of 8th April, 1904, regarding the French and English interests in Newfoundland and Africa; and the treaty of 5th September, 1905, ceding half of Sakhalin and

the lease of Port Arthur to Japan. Analogous to cession is the case of the separation of the Netherlands and Belgium in 1831 to 1839. Holland remained the same, but granted Belgium freedom and sovereignty. Similarly analogous are the cases of the granting independence to the Transvaal Boers by the Sand River Convention of 1852, and to the Orange River Colony Boers by the Bloemfontein Convention of 1854, and the restoration of independence, though in a qualified form, to the Transvaal by the treaties of Pretoria and London, in 1881 and 1884. The last case may be considered not in point in view of the suzerainty retained by the English Government (*see Parliamentary Papers*, C. 8721 and 9507), but, leaving aside the exact nature of the suzerainty, it is certain that the Transvaal was at least a semi-soverign state (*cf.* Baty, *International Law in South Africa*, Chapter II.), and had an international personality (*cf.* Westlake, i., 27). Of the opposite form of cession, where one state merges its identity in the other, is the treaty of the 7th December, 1849, above referred to, between Prussia and the reigning quasi-sovereign princes of Hohenzollern for the cession of these states to Prussia.

The case of the Ionian Islands is best regarded as a treaty of cession. The position of the islands was very anomalous, as they were said by the treaties of the 4th November, 1815, between England, Austria, Russia and Prussia, to form a free and independent state under the immediate and exclusive protection of the King of Great Britain and Ireland. The arrangements of 1863 practically amount to a treaty of cession by Great Britain, with the consent of the islanders, to Greece, though they do not take that form. Greece succeeded to the islands, subject to the terms of a convention between the great powers (*cf.* Westlake, i., 23; Hall, p. 28).

Cases of annexation or conquest are comparatively very few. Those usually quoted are the annexations by Italy and Prussia in 1860 and 1866. The facts are, that by proclamation of the 18th March, 1860, the King of Sardinia annexed the territories of Emilia (Bologna, Ferrara, Forli, Parma, Modena, etc.), and by proclamation of the 22nd March, 1860, the Duchy of Tuscany (*see State Papers*, LVII., 1029 *seq.*). Similarly, by proclamations of the 17th December, 1860 (*ibid.* 1040 *seq.*), he annexed (i.) the Neapolitan dominions; (ii.) Umbria; (iii.) the Sicilian Kingdom; and (iv.) the Marches. In all these cases, the annexation was based on a plebiscite of the population, though not actually sanctioned by the Governments which were overthrown, either by peaceful revolution, as in Parma, Tuscany and Modena, or by force of arms, as in Sicily and Naples. It is not possible to regard these acts as good precedents of conquest in so far as the treatment of claims against the Government by individuals is concerned. It would have been impossible for the Italian Government to adopt any attitude of standing on its strict legal rights towards new subjects whom it was most anxious to conciliate. The other examples, of Prussian action, are somewhat more in point. By a proclamation of 20th September, 1866, the German Emporor annexed to the dominion of Prussia, the Kingdom of Hanover, Hesse, Nassau, Frankfurt (*State Papers*, LVI., 1050), and by a Prussian law of 24th December, 1866, and a Patent of 12th January, 1867, Schleswig-Holstein. Prussia could, of course, base her action on the treaty of peace at Prague with Austria, but Austria had no right to cede Hanover, etc., and so the act was one of annexation pure and simple.

England gives us in recent years three good examples of annexation—examples which in many ways are of more importance than those of Italy and Prussia. These are the annexation of the Transvaal in 1877, which resembles closely the German and Italian instances; that of Upper Burma in 1886, a case of pure conquest; and that of the Transvaal and Orange Free States in 1900, which is also a case of conquest. It may, indeed, be argued that this case should be considered rather one of cession, as the war was concluded by a treaty of peace. This view

has actually been argued by Mr. Smuts, in *Van Deventer* v. *Hancke and Mossop* (1903, Transvaal Supreme Court Reports, 404). The argument in favour of this view is based on the description of the signatories to the articles of peace of Vereeniging, of 31st May, 1902, when Messrs S. W. Berger, F. W. Reitz, Louis Botha, J. H. de la Rey, L. J. Meyer, and J. C. Krogh are said to be "acting as the Government of the South African Republic," while four other persons are described as "acting as the Government of the Orange Free State." But this view is impossible. (i.) The annexations of 1900 were absolute in terms, and the British Government never in any way recalled them. (ii.) The wording of the description of the signatories is significant; "acting as" is contrasted with "on behalf of the British Government" in the case of Lord Kitchener and Lord Milner, and to the description of the Boers is added "on behalf of their respective burghers." (iii.) The document is described as "Articles," not as a treaty, and in the body of it no reference is anywhere made to the Governments of the Republics. (iv.) The correspondence preceding the Articles shows clearly that His Majesty's Government would never consent to the "renewed independence" of the Boer Republics—*see* the Secretary of State for War's telegram to Lord Kitchener, of 16th April, 1902 (Cd. 1096, p. 3). nor would they entertain any proposals based on the continued independence of the former republics which had been formally annexed to the British Crown (*ibid.*). The theory was, in the case of Van Deventer, expressly rejected by Innes, C.J. (at p. 411), and its only English supporter seems to be Sir T. Barclay in an article in the *Law Quarterly Review*, xxi., 307. on behalf of the shareholders of the Netherlands South African Railway. He attempts to show that the Government of the Transvaal, having appropriated the railway, was bound to pay for it; that this Government had been recognised up to 31st May, 1902, by His Majesty's Government, and that the British Government must stand to the shareholders in the same position as the Transvaal Government did. It is safe to say that His Majesty's Government would never consider this view for a moment.

Of other conceivable cases it is not possible to cite any modern instance of a conquest, not recognised by a treaty of cession, when only part of a country was conquered. From the point of view of the Argentine Republic it is possible that the Falkland Islands are so regarded. A settlement was made there by the Republic of Buenos Ayres in 1820, and the islands were claimed as formerly part of the Spanish Dominions. The settlement was, however, destroyed in 1831 by the United States, and the islands were recolonised in 1832 by Great Britain. The Argentine Republic long put forward a formal claim to them and did not permit her men-of-war to call there. The example is, however, of no use as a precedent, because Great Britain has always treated it merely as a case of occupation of desolate territory. Similarly, the case of a revolting part of a state establishing itself without a treaty of cession is not known to recent modern history, though this was the position of Spain in regard to the revolted colonies in South America.

These cases will be dealt with in Chapters IV. to IX., under the heads of cession and annexation, and after that will be considered the special cases of entry into a federal union (Chapter XI.), and protected states, etc. (Chapter X.).

CHAPTER III.

THE QUESTION OF STATE SUCCESSION IN ENGLISH LAW.

INTERNATIONAL LAW is recognised in most continental countries and in the United States of America as being part of the law of the land. It is, however, hardly possible to maintain this position with regard to England. It is true that, in connection with the privilege of ambassadors, International Law has received full recognition in England, and Lord Mansfield (3 Burrows, 1478, and 4 Burrows, 2016) in the cases of *Triquet* v. *Bath* and *Heathfield* v. *Chilton*, expressly declared that the law of nations was part of the common law of England, and that the Act of Parliament, 7 Anne, c. 12, was not intended to alter, and could not alter, the law of nations relative to the privileges of ambassadors, and he quoted Lords Talbot and Hardwicke and Lord Chief Justice Holt as concurring in this opinion. Further, in the case of *Wolff* v. *Oxholm* (6 Maule and Selwyn, 99) Lord Ellenborough decided against the validity of a Danish Ordinance confiscating debts due from Danish subjects to English people, consequent on the existence of a state of war, on the ground that the right contended for, though supported by Vattel, was not recognised by Grotius and was impugned by Puffendorff and others.

It is also true that international obligations have frequently been recognised by Acts of Parliament (Holland, *Studies in International Law*, pp. 176 *seq.*), and in the case of prize jurisdiction Lord Stowell, Sir J. MacIntosh, Sir Robert Phillimore and Dr. Lushington have all expressly asserted that the law they administer is International Law (Holland, pp. 196–199), and Lord Stowell and Dr. Lushington have held that International Law in a Court of Prize can overrule even an Act of Parliament.

It is, however, impossible to maintain the latter opinion, or even with Professor Holland (p. 195) to believe that the law of nations is incorporated into the common law which binds the courts of this country.* It may, indeed, be doubted how far Professor Holland intended to carry this theory. It was sufficient for his purpose to show that International Law was only part of the common law, and, as such, subject to be overridden by an Act of Parliament. The furthest that we can go is to admit that parts† of International Law have been incorporated with the common law, including the privileges of ambassadors and prize. This is clearly proved by the two leading cases on the question. Lord Chief Justice Cockburn in the case of the *Franconia* (pp. 154 *seq.*) held strongly that no consensus of jurists, nor even the clearest proof of unanimous assent on the part of other nations, would be sufficient to authorise the tribunals of this country to apply without an Act of Parliament what would practically amount to a new law. It is not quite certain exactly what view Lord Cockburn held as to the evidence required to show that any principle had been incorporated in English Law. It may be that he would not have been satisfied with anything short of an Act of Parliament or a continuous series of judgments. If so, this is probably going too far, but it is certainly necessary to prove that the particular proposition put forward in any case has been recognised and acted upon by England, or that it is of such a nature and has been so widely and generally accepted that it can hardly be supposed that any civilised state would repudiate it. This is the effect of the judgment of the case, *The West Rand Central Gold Mining Co.* v. *The King* (1905, 2 K.B. 491).

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* For dicta on this point *cf.* Best, C.J., *De Wiltz* v. *Hendriks* (2 Bing. 315); Forsyth, *Cases and Opinions*, p. 237, and *Law Quarterly Review*, xxii.

† For other points *cf.* Moore, *Act of State in English Law*, pp. 33–39.

This doctrine, obviously, has the effect of preventing English Courts from acting on principles which the English Government or Courts have not hitherto had any opportunity of expressing an opinion upon, and it probably goes much further than the legal theory of any other important state. The Lord Chief Justice, in the case cited above, would seem to consider that no law could be properly called international which had not received the assent of this country, but that seems a hard saying, and it seems legitimate to regard as International Law whatever has received the assent of the greater part of civilised nations, unless, indeed, there exists strong dissent on the part of a minority and the minority is a weighty one. It seems, therefore, to be best to take it that there may be International Law which is not part of the law of the Kingdom.

Indeed, it is only thus that we can avoid the absurdity of holding that no part of the law of state succession is International Law, for the law of England does not permit such questions to be tried in municipal courts. The Crown cannot be sued in England, whether in contract or tort, and the only remedy is in cases of contract or quasi-contract a petition of right, except where statutory provision to the contrary exists. It is true that a fiat will be granted whenever a *primâ facie* case of contract is made out, but the granting of the fiat does not enable the Crown to be sued for an act of state. It is established by a long series of cases that matters connected with the annexation of territories are entirely matters of state, and not justiciable by municipal courts. The first case is that of the *Nabob of the Carnatic* v. *The East India Co.* (1 Vesey Junior, 371; 2 Vesey Junior, 59). Of the rest* the most important are *Elphinstone* v. *Bedreechund* (2 State Trials, N.S. 379); *Rajah of Coorg* v. *East India Co.* (29 Bevan, 300); *Doss* v. *Secretary of State for India* (L.R., 19 Equity, 509); *Singh* v. *Secretary of State for India* (L.R. 2 Indian Appeals, 38); *Rustumjee* v. *The Queen* (2 Q.B.D. 69); *Secretary of State for India* v. *Kamachee Boye Sahiba* (13 Moore, P.C. 22). All these cases decide in effect that treaties of cession or otherwise, and annexations made by the Crown and their results are not within the cognizance of municipal courts. It is important, however, to notice the limits of this doctrine. It is not meant to cover such a case as, for example, that discussed in *Walker* v. *Baird* (1892, A.C. 491), where it was sought to prevent a court inquiring into an alleged trespass by an English Naval Commander on the Newfoundland station, on the ground that the act had been done in carrying out a treaty with France, and was, therefore, an act of state, into the validity of which no municipal court could inquire. The Privy Council declined to accept this view, and left undecided the question how far a treaty could override rights of common law—a point which has never yet been the subject of a final judicial decision. It is probable that there is no instance in which an act of state can be pleaded against a British subject, unless the act is one done against a foreign state, or prince, or subject by the English Government as an act of state, in which case it has been definitely laid down (*Buron* v. *Denman*, 2 Ex. 167) that English Courts will not interfere. The principle has recently been applied in the case of *Cook* v. *Sprigg* (1899, A.C. 572), in which it was expressly laid down that—

"It is no answer to say that, by the ordinary principles of International Law, private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that, according to the well understood rules of International Law, a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation."

So in the case of the West Rand Central Gold Mining Co., where the Transvaal Government had taken from the plaintiffs certain gold in October, 1899, just

* *Cf.* Ilbert, *Government of India*, pp. 174–177; Campbell, *Leading Cases*, i., 821–827.

before the war, and where the case was argued on the basis that the Transvaal Government was bound by contract to return the gold, it was laid down that no action lay against the Crown, as the only ground of the action would be the annexation of the Transvaal, which was an act of State. The question arises whether the view taken by the English Courts is to be regarded based merely on the technical doctrine of an act of state, or whether it at the same time represents the views of those courts as to the nature of International Law. We have recognised above that there may be a rule of International Law which English Municipal Courts would not enforce, and it may be noted that in the passage cited from the Lord Chancellor's judgment, in the case of *Cook* v. *Sprigg*, he recognises the possibility of the existence of such a rule. But from the case of the West Rand Mining Company it appears clearly that, in the case of contracts, at least, the English Courts hold that International Law does not recognise that obligations pass to the successor, and this corresponds exactly to the theory set out above.

The attitude of the Privy Council has, of course, been decisive for the attitude of the Colonial Courts, for its judgment in terms refers to all Municipal Courts, and, therefore, is independent of the system of law administered in any Municipal Court. This fact is fully recognised, both by Innes, C.J., and Mason, J., in their judgments in the case of *Van Deventer* v. *Hancke and Mossop* (1903, Transvaal Supreme Court Reports, at pp. 410 and 419), where they admit that they cannot question the legality of the annexation, though it might be open in other courts to criticism on the ground of its premature character.

The matter has recently been formally discussed in a series of cases in the Transvaal, viz., *Postmaster-General* v. *Taute; Treasurer-General* v. *Van Vuren; Postmaster-General* v. *Parsons;* and *Master of Supreme Court* v. *Roth* (1905, Supreme Court Reports, 582–594). In the case of Taute, an application was made by the Postmaster-General for provisional sentence on a mortgage bond passed by the defendant in favour of the Postmaster-General of the South African Republic. The defence put in merely alleged a debt by the Government of the Republic due to the defendant in respect of stock and supplies requisitioned for the use of the state during the war, which debt he endeavoured to set off against the claim of the Postmaster-General. Sir J. Rose-Innes said: "When, at the conclusion of a war, one of the combatant states is absorbed by the other, the conqueror becomes, by right of conquest, the successor to all the public property, corporeal and incorporeal, of the vanquished. That result follows so soon as a conquest is complete. In the present instance the conquest has been perfected by annexation, and the principle to which I have referred is one which certainly cannot be questioned in the courts of the annexing state. The debt sued upon was due to the late Government; it has become the property of the present one, and the Postmaster-General is the appropriate officer to represent the Crown in any steps taken to enforce it.

"But the conquering state cannot be sued in its own courts in respect of contractual obligations alleged to have been incurred by its adversary, because the annexation is an act of state carried out by the supreme authority of the conquering country, and neither the act itself, nor its legal consequences, can be called in question in the courts of that country. Those courts have no power to adjudicate upon it, and they are bound to recognise it. It is, therefore, impossible for them to declare that, as a result of annexation, any contractual obligations have been transferred from the one Government to the other. No doubt it is just and right that, in many cases, such obligations should be recognised; and if a conquering state were recklessly to repudiate all the liabilities of the country which it had absorbed, such conduct might lead to international complications, and would certainly be reprobated by civilised public opinion. Hence, wholesale repudiation is never likely to occur, and conquering Governments will, in practice, largely hold

themselves bound by the commitments of their predecessors. But though such an attitude may be adopted for reasons of policy, or from a sense of moral obligation, no country can be compelled to adopt it by a decree of its own courts. Even if the recognition of contractual obligations formed the subject of treaty agreement between the belligerents, the conqueror could not be sued upon his promises in his own courts. Honour and policy would induce him to observe his engagements, but municipal law would have no voice in the matter. As the conscience of mankind improves, the tendency will doubtless be to take an ever-widening view of the obligations which the conquering state ought to recognise. But liabilities incurred by a vanquished nation to its own subjects, in the prosecution of warlike operations against the conqueror, will probably be among the last to commend themselves to the latter as entitled to recognition."

This judgment asserts clearly the doctrine that an act of state does not give rise to a right to sue the Government. Further, it appears to leave to the moral sense, and the sense of expediency of the conqueror, the decision of the question to what extent he will recognise the contractual obligations of the Government to which he has succeeded; that is, the Chief Justice admits that, as a matter of International Law, there is no obligation on a successor to recognise all the commitments of his predecessor.

On this view, the results of English and Colonial Municipal Law do not differ from the results of a correct view of International Law, except perhaps in one case, which will be discussed below (p. 83). As the cases last cited show, the Courts accept jurisdiction when the state claims as a successor to the *rights* of the predecessor.

CHAPTER IV.

STATE SUCCESSION AS REGARDS TREATIES.

THE most important question in the matter of state succession is that of the extent to which a cessionary or conquering state is bound by the treaties of the ceding or conquered state. Together with this may be considered the question how far the treaties of the conquerer or cessionary extend themselves over the conquered or ceded territory. The positions which I shall endeavour to establish are, that (i.) no treaties are inherited by the conqueror or cessionary, but (ii.) all his treaties pass over. Supporters of the universal succession theory must contend that theoretically all treaties pass over, and discover reasons to explain the notorious fact that many treaties do not pass over. Huber's attempt is the most satisfactory. He lays it down (p. 63), "Treaties, in doubtful cases, pass to the person who obtains the state territory so far as they concern his acquisition. Treaties which constitute personal rights of the ceding state come to an end *ipso jure* for the cessionary." The meaning of *jura personalia* he thus explains: Treaties are not in the ordinary sense of the words *jura personalia*, in that there are two persons and a third comes in, either in place of the one (a conquest), or beside him (a cession). The right from treaties is not an abstract right concentrated in the person of the state, but a regulation of relations of power, right and duties with regard to a territory. The personal element consists in the fact that the exercise of the power in the territory belongs to a certain state. This is shown by the fact that a power, which has given provinces to another to administer, cannot bind them by its treaties. This characteristic of being personal to the state explains why (i.) treaties of cession not yet fulfilled, (ii.) capitulations in territories ceded to other European states by Turkey—*i.e.*, the Russian conquests, Algiers and Greece—do not remain in force. Of other treaties, he points out that many of them have their effect at once, and are not, therefore, subjects of succession. They produce real rights, and, therefore, are not any longer contracts. There remain, therefore, as objects of succession, treaties for regulating boundary relations, streams, river navigation, railway conventions and, perhaps, such treaties as concern classes of person—*e.g.*, free exercise of religion, use of schools, hospitals, etc., which are mainly local in character.

Similarly, in the case of a state formed by separation from an old one, Huber (pp. 136, 137) holds that all treaties pass over, even in the case of commercial treaties and capitulations, but not alliances and guarantees. Even in cases of conquest treaties pass over (pp. 151, 154) in theory. In practice the operation of the principle is hampered by the fact that (i.) some treaties essentially presuppose the continued existence of the same state, *e.g.*, alliance, subsidies, commercial treaties; (ii.) the new state's treaties extend to the conquered territory, and so, especially in the case of commercial treaties, supersede the old ones.

Compared with Huber's accuracy, few of the other writers discuss the matter satisfactorily, Rivier (i., 216) holds that in cession the so-called "traités d'association" do not pass over, this term including treaties of alliance and guarantee, consular treaties, extradition, legal aid arrangements, commercial, shipping, settlement, post, customs, telegraph, and other administrative treaties.

This view is shared by Fiore (i., 221). Bluntschli (para. 47) thinks that on cession there pass to the cessionary treaties regarding regulation of frontiers, river navigation and rights to churches, hospitals, etc., granted to special classes of persons. In these views he is exactly followed by Pradier-Fodéré (i., 274). In the case of conquest, Bluntschli (para. 50) holds that, as the people and territory continue to be the same, all obligations pass over so far as may be reconciled with the new order of affairs. But, in the case of a state becoming free from its parent state, he (para. 48) holds that, normally, no treaties pass over. Martens (i., 279), in the case of conquest, holds that commercial treaties do not pass over, and in the case of cession, that treaties such as treaties for river navigation pass over. Rivier (i., 72; ii., 141) and Fiore (i., 220) both hold that in conquest treaties, save treaties regarding river navigation, etc., do not pass. Calvo (para. 98) is inclined to hold that the circumstances of each class of treaty must be taken into account. Hartmann (para. 13), Holtzendorff (*Encyclopädie*, p. 1289), and Pradier-Fodéré (i., 275), all deny a succession in cases of a state becoming independent. Hartmann (para. 14), Pradier-Fodéré (ii., 930), Gabba (p. 376), Appleton (p. 62), and Wheaton (p. 46), deny succession in case of conquest. Hall's view (pp. 92, 93, 98, 99) is that in all the cases of cession, of separation, and of conquest, treaties of alliance, guarantees, or of commerce, do not pass, but treaties such as those of river navigation, etc., pass over. Westlake (i., 66, 67) holds that, in the case of cession or conquest, the population of the transferred or annexed area will lose both the benefit and the burden of the treaties of the transferor or extinguished state, excepting only the benefit of transitory treaties and servitudes; Kiatibian (pp. 35, 60, 67 and 103) holds that, in the case of cession, separation, and conquest treaties usually fall to the ground, but he excepts (i.) treaties such as treaties of river navigation (pp. 31 *seq.*), (ii.) treaties of guarantee of foreign loans (pp. 23 *seq.*). On the other hand, political treaties, such as treaties of alliance, subvention, or neutrality, disappear, and also commercial treaties (p. 16). These, he holds, are concluded in view of the economic conditions of the annexed state, and require a continuation of these conditions inconsistent with the right of the conqueror. So (p. 19) treaties like treaties of copyright or extradition cannot subsist. If they did, they might lead to the absurdity that extradition would depend on what precise part of a state a man was in, and nationals in one part of a state, might be worse off than foreigners. All treaties (p. 20) which depend on membership of a union cannot pass over. A state could only join the Latin Monetary Union, or the Sugar Convention of 1888, with the consent of all the other members of the Union. Nor (p. 21) does a successor succeed to the place of a predecessor as a contracting party in great European treaties.

All agree, however, that in the case of cession the ceding state retains its rights and obligations, whether they descend or not in any degree to the successor. Of course the loss of territory will render some of these, *e.g.*, treaties for river navigation or boundary regulation, no longer applicable. Fiore (i., 225) says: "The state does not lose its juristic existence, nor its identity, despite the partial diminution of its territory." Hall (p. 92) says: "As the old state continues its life uninterruptedly, it possesses everything belonging to it as a person which it has not expressly lost." So also Rivier (i., 217), Martens (i.), Calvo (i., 235), Westlake (i., 59, 60), Bluntschli (paras. 28, 46, 47), Halleck (i., 76), Wheaton (p. 46), Kiatibian (p. 35), and Huber (p. 61), who says: "The ceding state and cessionary both remain unaltered in their international personalities." Appleton (pp. 109 *seq.*) holds that the cession of territory alters, to some extent, the state personality, which is, as it were, broken up into two personalities, to both of which some of the rights and duties of the previous personality attach. But this view is not admissible in the case of a mere cession. The personality of the state, as Bluntschli (para. 46) points out, is not essentially dependent on its boundaries.

The evidence, from the practice of nations, is all in favour of the lack of continuity in treaty obligations. The exceptions are mostly of a special nature. Prince Bismarck (*see* Kiatibian, p. 118), at the Berlin Congress, laid it down as a principle of law that a province separated from a state could not release itself from the treaties to which it had hitherto been subject, and this principle was carried into force by the Congress, by making Roumania (Art. 51) and Servia (Art. 58) succeed to the railway treaties of Turkey, and, in the case of Servia, by subjecting her to the existing commercial and navigation treaties, pending the conclusion of new arrangements (Art. 37), although, by Art. 24, her independence is expressly recognised. Similarly, the treaty privileges of foreigners in Roumania (Art. 49) and in Servia (Art. 37) are preserved, but this is, of course, of no real value as law. It is a case of a great European settlement, and, obviously, in freeing Servia, the European powers took care not to inconvenience themselves by the doctrine of freedom from treaties in a new state. It is notorious that Prince Bismarck's views of law were always based on expediency, and his declaration cannot be taken as decisive from a legal point of view. Again, Kiatibian (p. 31) says that the boundary treaties between Hanover and the Netherlands passed over to Prussia in 1866; the treaty of 14th November, 1863, regarding the Ionian Islands, expressly stipulated that the treaties made by Great Britain for the islands should remain in force.

On the other hand, the evidence against the succession to treaties is copious and distinct The United States never regarded themselves as in any way bound by, or entitled to, the benefits of the treaties of the United Kingdom (Wharton, ii., 71). Thus also, the United States considered its treaties with Algiers as abrogated by the French conquest of 1831; its treaties with Central America as abrogated by the dissolution of the Federation in 1839; its treaties with Hanover by its conquest by Prussia in 1867; its treaties with Nassau by the same event (1846, in Wharton, ii., 64, though repeated in Atlay's Wheaton, p. 46, is a mere slip); with the Two Sicilies by their absorption in Italy in 1860. Similarly, Lord Clarendon, on behalf of Great Britain, in the dispute with the United States over the Mosquito Protectorate, maintained that Mexico did not succeed to the Conventions of Spain with Great Britain, *ipso jure*, but only by express agreement (Hall, pp. 95, 96). So in 1860, Sardinia issued a declaration to the effect that the treaties of the annexed States were, *ipso jure*, dissolved. The Netherlands formally declared, in unison with Prussia in a treaty of 14th October, 1867, that the extradition treaty with Hanover had passed away through the conquest, and had been superseded by the treaties of the Netherlands and Prussia (Rivier, i., 73). In the case of the annexation of Madagascar by the French in 1896, although the British Government vehemently protested that the annexation was an act of bad faith, and that their Customs Treaty with the Madagascar Government should be maintained, a view abandoned only in the treaty with France of April, 1904, yet they never denied, and the United States also admitted, that they could not claim that the Customs Treaty remained in force despite the annexation. Similarly, on the separation of Cuba from Spain, and the annexation of Puerto Rico and the Philippines by the United States, the Spanish treaties ceased to bind either territory, and the United States framed a tariff for Puerto Rico and the Philippines, while the Government of Cuba has negotiated commercial treaties between itself and the great powers.

As Sardinia in 1860, as Prussia in 1866, so Great Britain in the case of the Orange River Colony in 1900. All the treaties of the Transvaal and of the Orange River Colony were regarded as having fallen to the ground so far as they remained executory. Of course, treaties which have had their effect remained in force in so far as their results were concerned. Thus the boundary delimitations made under the Portuguese-Transvaal Treaty of 1869 were accepted, so far as they had been carried out, but all treaties which remained contracts fell to the ground. For

example, the arrangement with Mozambique for railway traffic and recruiting of native labour passed away at once, and had to be replaced by a formal convention in 1901. Similarly the customs and railway treaties with the Cape of Good Hope and Natal fell to the ground, and required renewal between the parties. Of course, in these cases the fact that the places concerned were all colonies of one power rendered the renewal possible with very little friction, but the principle was exactly the same as in the case of the Portuguese *modus vivendi*.

The facts seem, therefore, to show clearly that all treaties go by the board. The instances alleged by jurists resolve themselves into cases where, as in the European settlement with Turkey in 1878, treaties are, by a fresh convention, continued in force when normally they would disappear, or into cases where other explanations are easy. Prince Bismarck's view was evidently an inaccurate one, or else there would have been no need to insist on the Treaty of Berlin in 1878, containing an express affirmation by the powers of the binding effect on Servia of Turkish treaties regarding railways, etc. These clauses are really renewals of the treaties. The other cases possible are those treaties which confer a privilege of navigation on a river beyond the boundaries of the state, or treaties for the regulation of boundaries, maintenance of river banks, railway communication, etc. As we have seen above, there is a considerable body of juristic opinion that such treaties pass over. But there is no need to assume this. If the new Government were to choose to decline to recognise any such treaty it would be acting strictly logically, and it is absurd to argue that such treaties can *de jure* remain in force when all others are permitted to go. As a matter of fact, such treaties are usually essentially advantageous to both parties, and are accordingly tacitly or informally renewed, either by being acted upon or by an exchange of notes. If, of course, they are acted on, the states estop themselves from denying that they have consented to renew the treaty.

The real truth appears to be that treaties are, as Kiatibian (p. 60) points out, *res inter alios actæ*. This may, as Huber says, contradict the idea of succession, but it is not of course inconsistent with the view of state succession taken in this essay. On the other hand, Huber and every one else have to admit that most treaties are in some way too personal to pass over, and they must maintain the thesis of a general succession for the sake of the odd treaties which do seem to persist, but whose persistence can easily be explained by the doctrine of tacit or informal renewal. Huber (p. 151) declares that it is necessary to admit succession as the principle, or the cases in which succession does take place cannot be explained, yet (p. 64) he admits (i.) that only the contracting powers can decide which of the treaties are *jura personalia*, whence it follows that, if A asserts and B denies that a treaty is of this class, it goes to the ground, unless B is prepared and able to force A to maintain it; (ii.) that the clause implicit in every treaty, *rebus sic stantibus*, holds in the case of even those treaties which are not *jura personalia*, so that evidently the other party can always denounce a treaty on that ground; (iii.) that if treaties which are *jura personalia* do pass over, whether tacitly or by express arrangement, this is a case of a new treaty. In writing the passage on p. 151 Huber can hardly have had before him the passage on p. 64. In the former passage he argues that a seceding state must succeed to treaties, or how could it be able to be bound by or to be benefited by any of those of the parent state? But surely it is enough to say that the new state formed by separation has before it the choice of following the same methods of action relative to a third party as its predecessor or to strike out a new line. If it adopts the former course then it tacitly or expressly forms for itself a new treaty between new parties with the third party. On this view the treaty is a *res inter alios acta*. The new state cannot step into the treaties of its mother country or the conqueror into the treaties of its conquest. The contract dies with the death of the state in the case of conquest; in the case of cession it remains

binding on the parent state. Of course a cession may so weaken the parent state that it cannot any longer fulfil its obligations, but that is a case for denunciation on the *rebus sic stantibus* principle mentioned above. It is no doubt true that the state is a peculiar sort of person, but it is not possible to regard a treaty as subsisting with reference to a territory or population without a state. For purposes of International Law it is laid down and accepted that a state person does not alter because of internal changes, but it is equally certain and accepted that a state person is extinguished by conquest, and so ceases to exist as a person, and that cession cannot transfer any of the rights of the ceding state *qua* an international person. Huber himself admits that no conquest can give any claim to the rights and obligations of international personality.

Huber (p. 152) himself has to use the theory of silence to explain the fact that the treaties of a cessionary or conqueror extend to the determination of other treaties over the ceded or conquered territory. This may be regarded as quite fixed law. It is asserted by Fiore (i., 221, 222), Rivier (i., 216), Holtzendorff (ii., 42), and treated at length by Kiatibian (p. 79). The treaty of Zürich (10th November, 1859) extended (Art. 17) the Austrian treaties with Sardinia over the territories newly acquired by the Sardinian kingdom. In 1860 the Italian Government declared that all the treaties of the annexed states, Parma, Modena, Romagna, Tuscany, Naples, and Sicily, Umbria and the Marches, were superseded by the treaties of Sardinia. The Courts both of France and of Italy have held that the treaty of 1760 between Sardinia and France for the mutual execution of judgments applies to Naples and all Italy since 1860. In 1866 the treaties of Prussia superseded those of Frankfurt, Hesse, Nassau, and Hanover, and received recognition as such by the powers. The Netherlands, in the declaration of the 14th October, 1867, referred to above, formally recognised the supersession of their extradition treaties with Hanover by the treaties with Prussia. The treaty of 11th December, 1871, between France and Germany provides (Art. 18) that to the ceded territory there should apply, in the absence of any treaties with the newly formed German Empire, the treaty of France and Baden of the 16th April, 1864, for the execution of judgments, the Prussian extradition treaty of the 21st June, 1845, and the Bavarian copyright treaty of the 24th March, 1865. So also in 1886 Upper Burma came under the operation of the treaties affecting India, and in 1900 the treaties of commerce and friendship between the South African Republic, Germany and Portugal, and the treaties of the Orange Free State with Portugal, fell to the ground and were replaced by the British treaties with Portugal and Germany. Of course it is a question how far these treaties could be operative, in so far as there was no local law to carry them into effect, but the question, which in England, as in the United States, is undecided, is one not of International but of Municipal Law. So on the annexation of Puerto Rico and the Philippines, these islands, ceasing to be bound by the treaties of Spain, became subjected to the treaties of the United States. Cuba, not being annexed by the United States, proceeded to form treaties of its own. Since 1905 the Southern half of Sakhalin has fallen under the customs and other treaties of Japan instead of those of Russia.

Certain limits on the succession to treaties in this case have been suggested. Despagnet (*see* Westlake, i., 67, n.) considers that an annexing state, if agricultural, could not claim that its commercial treaties with other states should apply *ipso jure* to a chiefly industrial territory annexed to it. Kiatibian (pp. 84 *seq.*) followed by Huber (p. 65) thinks that the refusal to apply the treaty to the annexed territory, and in certain cases the denunciation of the treaty as a whole, would be justifiable, especially in the case of colonial possessions. Further, in the case of guarantees of neutrality, the guaranteeing powers might not be bound if the power guaranteed received an access of territory. If the guarantee was given on purely political grounds it would be upheld; if on military considerations it might not be—

e.g., in the case of neutrality of Belgium and the Congo Free State. These doctrines are, however, very vague, and it is not reasonable to suppose that a power has the right to decline the extension of the treaties to the territories annexed or ceded. He has, it is submitted, the right only to apply the usual rule of treaties and to denounce the treaty as a whole, when the circumstances are so altered as to render it unfair that the state should any longer be bound—a vague rule but the only possible one, and one which precludes, as Westlake points out, disputes about small additions of territory. The case of Belgium and the Congo Free State has not yet risen in practice, because the Free State is still, in point of law, the private possession of the King of Belgium. If Belgium ever accepts the Congo as a colony, then it will be for the powers which guarantee the neutrality of Belgium to decide whether they will continue that guarantee, or whether they will intimate to Belgium that the guarantee will be withdrawn unless the Free State is abandoned.

To the rule that treaties of the ceding or annexed state do not bind the cessionary or the annexing power there is said to be an exception, or an apparent exception, in the case of transitory or dispositive treaties (Westlake, i., 60, 61). The alleged cases may be divided into two sets: (i.) treaties of cession and treaties regarding boundaries, etc.; (ii.) treaties creating servitudes. The first class of treaty is no exception at all to the rule which has been laid down. The successor takes what he has conquered or what is ceded to him. He conquers or accepts a country with fixed boundaries as settled by European history, and he cannot claim to undo cessions which have already been carried out. The real fact is, of course, that a treaty of this sort is no longer a contract; the contract has passed into a conveyance, and the transaction cannot, therefore, be affected by the fact that one of the parties to the original conveyance has changed. It is admitted by practically all jurists that a conqueror is not bound by a treaty of cession entered into by the annexed state but not carried out. Of course, if the successor finds that his predecessor has, during the course of the operations which lead up to the conquest, alienated large portions of his territory in order to defeat legitimate rights, then the conqueror may, no doubt, on the analogy of a fraudulent conveyance in private law, contest, diplomatically, the actions of his predecessor, but the matter then tends to pass from the sphere of International Law to that of politics.

The second class of exception, however, appears to be of a different nature. A servitude, though in a sense a right *in rem*, yet essentially involves a relation of one state to some other state or states which must be of a contractual character. On the theory of universal succession there can be no doubt that the successor must be bound by such servitudes. On the theory of singular succession it must be held that the substitution of the new power causes the quasi-contractual relation to cease, and if the relation is renewed, it is a new quasi-contract and not a continuance of the old. The jurists are in favour of the theory of universal succession. Hall (p. 92) says "it" (*i.e.*, a new state formed by separation) "is saddled with local obligations such as that to regulate the channel of a river, or levy no more than accustomed dues along its course"—a dictum which would cover a servitude. So also Bluntschli (para. 47); Vattel (ii., 203); Heffter (p. 162) and Halleck (ii., 483) may also be cited for this view. Huber (p. 66) says: "With regard to *jura in re aliena* both theory and practice do not question the rules; '*res transit cum suo onere*' (D. 54, 50, 17) and '*nemo plus juris ad alium transferre potest quam ipse habet*' (D. 20, 41, 1)." The most important supporters of this view are Kiatibian (pp. 55 *seq.*) and Rivier (i., 73, 215, 299).

The evidence from practice is as follows:—

(i.) The Treaty of Paris in 1815 created, for the benefit of the Swiss Confederation, a servitude that the Fort Hüningen, near Basle, should not be restored, and that its fortifications should not be replaced by new fortifications at a less distance than three leagues from the city of Basle. This territory passed to

Germany on the cession of Alsace-Lorraine, and the servitude is regarded by the jurists as still being in force. But in any case this is not decisive for the rule of International Law, because Prussia was one of the parties to the Treaty of Paris, and in that treaty it undertook with the other high contracting parties to secure the destruction of the fortifications, and it could not well, in 1871, ignore its action in the Treaty of Paris. Further, it should be noted that the French Revolutionary Government in 1848 declared that the article was no longer binding on the French Government (Westlake, i., 289), and it is by no means clear that there is any good ground for the theory that the servitude still exists.

(ii.) The final act of the Vienna Congress of 1815 decided that the provinces of Chablis and of Françigny, and all the territory of Savoy north of the Ugine belonging to the King of Sardinia "will form part of the neutrality of Switzerland as it is recognised and guaranteed by the powers." This servitude existed for the benefit of Switzerland, and in the Treaty of 24th March, 1860, it was provided that the land ceded by Sardinia should remain subject to the neutrality, and on the 14th December, 1883, the French Ministry expressly declared that they would respect the neutralised territory. This is, of course, easily explained by motives of prudence. A repudiation of the necessity of respecting the neutralisation would have been, in effect, a repudiation of a treaty—that of 20th May, 1815, in which France had joined with Sardinia, Austria, Prussia, Russia and Great Britain in guaranteeing the neutrality of the Sardinian territory referred to.

(iii.) It is said that the Swiss right of passage on the South bank of the Lake of Geneva has passed over to France as an obligation. The improbability of this right ever being claimed under modern circumstances renders the instance of no value. It may be compared to the servitude of conveying their troops through the Valais to Piedmont which the Sardinians enjoyed before the cession to France, and which admittedly has disappeared.

(iv.) The Treaty of Paris, of 30th May, 1819, provided that the Harbour of Antwerp would be only a port of commerce, and in the treaty of 19th April, 1839, between Belgium and the Netherlands, the same rule is laid down. But this provision, of course, is only natural, as the relations of Belgium and Holland were being regulated by the Great Powers, who had every reason to see that their Treaty of Paris was not infringed upon.

(v.) It was argued by a writer in the *Standard* in 1891 that should Newfoundland be ceded to the United States of America the treaty obligations towards France would pass with it, and Kiatibian and Rivier assent to this view. Of course, the writer in the *Standard* cannot be regarded as an authority of weight, and his view cannot be considered to prove more than that, politically and legally, Great Britain was bound either to satisfy France's claim in Newfoundland, or, if not, to cede the island to the United States of America, if ceded it was, subject to the French rights. But it is incredible that, had Great Britain ceded the island in absolute terms, the French rights would have gone with the cession. The United States would have replied that the cession was absolute; that the French rights were based only on a treaty; that a cession did not carry the binding force of treaties on the ceded territory; that France must look to England. Clearly England would be liable, and France could not do more than demand that England fulfil her promises. Take the case of the conquest of Newfoundland by the United States. It would not have been possible for France to claim that the United States were bound by the treaties with England; that is to say, whatever view France took of her rights, as a matter of fact she would not have been able to press her view with any prospect of success on the United States. A servitude is essentially a thing that requires the identity of the parties or an alteration by consent for its continuance.

This view is really supported by Rivier (i., 73), for he frankly admits that the successor can denounce the servitude, for treaties establishing servitudes must

be regarded, though dispositive, as being concluded on the condition *rebus sic stantibus*. If this is so, clearly the United States could denounce the treaties made with England, and the legal basis of a servitude drops. Westlake (i., 61), however, denies the correctness of the doctrine, and thinks that for this "it would have to be shown that the interests of third parties, which the servitudes were intended to secure, had ceased to exist in consequence of the change of sovereignty over the territory which it affected," and adds that it would be difficult to show this in such a case as that of the Swiss and European interests secured by the neutrality of Northern Savoy, which must, therefore, be considered as obligatory on France as the successor of Sardinia. The case cited is not in point because the obligation was taken over by France under treaty, as we have seen above, and in any event the argument would not apply in the case of an ordinary servitude, such as that of France and Newfoundland before 8th April, 1904, because in such a case no European interest is involved. But the impossibility of the doctrine seems to follow from this point also. Could France have ceded to any other power her rights in Newfoundland? The answer must certainly be that she could not, and that, similarly, a conqueror of France could not have claimed these rights. On the other hand, had France owned any territory in Newfoundland she could have ceded it, or a conqueror would have been entitled to it; no one doubts that. But a servitude is too essentially of a contractual character to be treated in International Law as a right *in rem*. The principle is really conceded by Hall (p. 90, n.), when he admits that a state may be able to make a cession of territory free from its own obligations, which could not be done if a servitude were right *in rem*.

It may be remarked that Huber (p. 67) points out that cases of servitude are different from mere treaty obligations, such as the neutrality of Switzerland itself, or the right of the German Confederation to keep a garrison in Luxembourg—a right now obsolete since the German Confederation had no successor (Rivier, i., 300). The reason given by Huber is that the neutrality does not affect the land itself, but it seems very difficult to follow this distinction, and the safe plan is to regard all servitudes as contractual obligations just as the neutrality of Switzerland is contractual.

It may be desirable to note one further result of conquest—the fact that all the treaties of the conqueror with the annexed state disappear, and that rights stipulated for on behalf of people in the conquered state cease to have any validity against the conqueror. This, of course, follows from the doctrine of *confusio*, and is fully recognised by the jurists. It may be sufficient to illustrate it by a couple of recent instances in the Transvaal. With a view to protecting the natives of the Transvaal after 1881 from unfair treatment, it was laid down in the conventions of 1881 and 1884 that they should be allowed to hold land, but that all such holdings should be registered in the name of a commission or officer of the Republic. This continued from 1881 to 1905, when an action was brought in the Supreme Court of the Transvaal to compel the transfer of land in a native's name (*Tsewu* v. *Registrar of Deeds*, 1905, Supreme Court Reports, 130). The Court held that the registration was never necessary to be made in the name of any one but the native; that even before the annexation the treaty had not the force of law, but that, in any case, after the annexation it certainly had not the force of law, as it then fell to the ground. The other is a case of legislative action. A treaty of 10th December, 1894, between Great Britain and the Transvaal as to Swaziland, provided, *inter alia*, that "every exclusive right or privilege of, or belonging to, any individual, or individuals, corporation or company, with regard to imposition of or exemption from customs duties on goods, shall be liable to expropriation," subject to compensation, to be assessed by arbitration in case of difference. Each party was to appoint an arbitrator, and the two arbitrators were to appoint an umpire, or, if they disagreed, the Chief Court would appoint (Art. 10). His

Majesty's Government, when taking over Swaziland, decided to alter the procedure in such cases, and, no doubt on the view that the treaty had fallen to the ground, considered itself justified in passing a Proclamation (No. 3 of 1904), by section 12 of which a commission was to be appointed to decide as to concessions, and the Government was empowered to expropriate any concession at an amount not exceeding its value prior to the commencement of the war of 1899–1902. This would, of course, be quite impossible if the treaty had any binding force, and it seems to show how little force can possibly attach to treaties between other powers and the defunct state, when a treaty solemnly entered into by Her Majesty's Government does not bind it because of the disappearance of the other party. A similar case is that of the private revenue concessions of the Queen of Swaziland, also confirmed by the treaty of 10th December, 1894. Under it the Queen was to draw £1,000 a month from the concession holder in return for permitting him to collect all the so-called private revenue of Swaziland. On the annexation all the powers of the South African Republic passed to His Majesty's Government, and by a proclamation of 1905, the Governor of the Transvaal, who, under the Order in Council of 1903, is the Legislature of Swaziland, cancelled the concession which had passed before 1899 into the hands of the South African Republic, and provided that in future the private revenue should be paid into the hands of the Government of Swaziland. Thus, again, a right confirmed by Her Majesty's Government by treaty has been regarded as no longer binding on His Majesty's Government through the disappearance of one party to the treaty.

With regard to other than treaty relations of states, it is sufficient to note that Huber (p. 65) points out that quasi-contractual obligations may well exist, such as the enrichment of a state without just cause or obligations *ex communione* when a successor comes into possession of the common object through his ownership of the state territory (*see* Heffter, p. 218; Rivier, ii., 41 *seq.*) Examples of this sort of obligation are not of importance, and of course they do not apply to cases of conquest. On the other hand, it is important to note that Huber does not think that obligations *ex delicto* or *quasi-ex delicto* pass over. He adds that if the wrong is in any way connected with the ceded territory a second delict would arise if the owner did not remove the cause of injury to the third state, but that for his *dolus* or *culpa lata* the original offender remains responsible personally. It does not seem to me that this is open to any doubt, but it does seem surprising that Huber does not see that the doctrine that obligations *ex delicto* do not pass over is only to be supported on grounds that throw grave doubt on the validity of the doctrine regarding the passing over of contractual obligations. The ground is that they are pure personal rights, and that in private law such rights are not heritable. But after all, as Huber himself has argued, the person of private law and the person of International Law are not the same, and, apart from the analogy, it is not possible to argue that the state's obligations *ex delicto* are any more or less personal than its obligations *ex contractu*. The argument of the origin of a new delict can equally be applied to the continuance of a contract as the origin of a new contract when things go on as before. Neither Huber nor any one else seems to face this argument. They all fall back on the rule of Roman Law, which is not, however, in my opinion at all logically transferable to a person of International Law. They are forced to this position by their doctrine of succession; if they admitted merely a singular succession and the emergence of quite a new state person, they would find no difference in the treatment of obligations of contract or tort, and would not require to support themselves on inaccurate analogies. In Huber the fact is the more remarkable as (p. 115) he allows non-contractual obligations to be binding on a successor when the obligations are to private persons and not to states.

It may be here noted that Huber does not deal with the question of the right of a successor to sue on obligations *ex delicto*, either in the case of individuals or other states. This point raises a serious difficulty to his theory. For, according to Roman Private Law (Justinian, *Inst.*, iv., 12, 1, Moyle's note), an action was actively transmissible in all cases save those based on grievance or insult to the person, and so a successor state could claim on that analogy against a state which had offended its predecessor in any matter other than a mere slight or piece of discourtesy (*e.g.*, to the monarch or the ambassador). But this would be notoriously contrary to law and usage, and so this fact is probably deliberately ignored in treating of state succession. As we shall see in Chapter VIII., the case of a claim even against an individual has been expressly held by the law officers of the Crown not to pass to the successor.

CHAPTER V.

STATE SUCCESSION IN RELATION TO THE TERRITORY, LEGISLATION, ADMINISTRATION, AND JURISDICTION OF THE STATE.

THE boundaries of the territory acquired by the cession or conquest are regulated either by the treaty of cession or by the recognised boundaries before the conquest. If these boundaries are exceeded, then it is an act of aggression on the part of the cessionary or conqueror, giving rise to war should the aggrieved country see fit. Such a succession has nothing to do with succession to treaties. A boundary treaty, when completed, is not a contract but a conveyance, and the boundaries established are, as in the case of private law, good against the world. The cessionary or the conqueror cannot re-open the question on any legal grounds.

Cession or conquest gives title to the territorial waters of the state and its islands, even without express mention in treaties, though they are often definitely included—*e.g.*, in the treaty of 30th April, 1803, for the cession of Louisiana by France to the United States; the treaty of 30th October, 1864, for the cession of Schleswig-Holstein; the treaty of 1st July, 1890, for the cession of Heligoland to Germany; and the Russo-Japanese treaty of 1905.

A cession of territory or the conquest of territory by a revolting colony without cession cannot be regarded, however, as conveying more than the rights over the land ceded, or the territory occupied by the revolting colony. Whether we regard the United States as having obtained their territories by cession, which is, in my opinion, technically the correct view, or as having obtained them by conquest only, still their rights cannot be supposed to extend over territory beyond their own limits. The United States for many years maintained the view that the States succeeded, in common with other British subjects, to all the rights enjoyed by other British subjects in the North American fisheries. They considered that the fact that fishery rights in Newfoundland, Nova Scotia, and Labrador were granted by the treaty of 1783 was not a mere concession but a recognition of an international right, and that, therefore, these rights were not abrogated by the war of 1812. The British Government argued that on the occasion of 1783 the rights of the United States were confined to their own territories, that the grant of fishery rights elsewhere was a mere concession, and that the clause of the treaty with regard to these rights was accordingly *ipso facto* terminated by the war. The United States practically gave away their own case in 1818, when they consented to the rights being renewed by treaty stipulations, and when in 1854 and 1871 they again consented to treat regarding their rights. This was admitted by Mr. Dana before the Halifax Fisheries Commission in 1878, and it is not now open to the United States to maintain the contrary view (*see State Papers*, vii.; *Parliamentary Papers*, vols. lv., lxxiv., lxxv., lxxx., cix.; Henderson, *American Diplomatic Questions;* Hall, pp. 93–95).

In the case of a treaty of partition and boundary made between a mother-country and a seceding part, Hall (p. 97) holds that the treaty operates not as a treaty of cession but as an acknowledgment that the territory is in the possession of the state which has succeeded in establishing itself. Were it otherwise the absurdity would present itself that a new state-community would have no title to its territory until such a treaty was made, although the conclusion

of a treaty with it involves a previous acknowledgment that it is a state, and that it is in legal possession of its territories. This does not seem to me a very happy way of looking at the matter. It does not, indeed, from the point of view of the theory of state succession, make any difference, since, even if it is a succession by conquest, nevertheless it is regulated by the treaty just as much as if the treaty were one of cession, and so the distinction is not here important. But, looked at strictly, it is rather the case that the parent country recognises the seceding colony and its territorial limits only in the act of making the treaty. Up to that act there is no acknowledgment that the seceding colony is a state and that it is in legal possession of its territory. Until then it is a mere rebel and in illegal detention of another's territory. Hall's idea rests, of course, on the logical doctrines (i.) that there must be two sovereign states as parties to a contract, and (ii.) that an international person must have a state territory. But these doctrines can hardly be accepted. There must, indeed, be two parties to a contract, but it is quite possible that one of these parties becomes a sovereign state merely through the contract itself. It is true that such a contract belongs to the so-called transitory type of treaty; that it effects a conveyance, and gives the state created a right to its position as a right *in rem*, good against the world and not revocable by the other state. But there are somewhat analogous contracts, *e.g.*, that for a cession of territory. Hall's theory, while not logically conclusive, is open to grave objections on other grounds. Suppose the colony to which independence is granted has not asserted its independence by war, and is not in possession of all the territory granted to it. The United States was certainly not in possession of more than a fraction of the vast territories granted in 1783. The Orange River farmers on whom, much against the will of a substantial minority, if not a majority, independence was forced by the Bloemfontein Convention of 1854, had done nothing to give themselves a claim to be a separate state, and had under their control but a small part of the territories acknowledged to be theirs. Even the Transvaal burghers, who received independence by the Sand River Convention of 1852, had neither a *de facto* independence nor the possession of the ceded territories. In both these cases, as in the case of the Pretoria Convention of 1881, no pretence was made of a convention with an existing Government. The Sand River Convention of 1852 was expressly described in Sir George Cathcart's Proclamation of the 15th April, 1852, as a "gracious permission," and the first article of the Bloemfontein Convention of 1854 guarantees the future independence of the Orange River territory and its Government, and provides that after the necessary arrangements have been completed the people of the country shall be free, and that their independence shall be confirmed by an instrument freeing them from their allegiance to the British Crown, and declaring them to all intents and purposes a free and independent people, and their Government to be treated and considered thenceforth a free and independent Government. The two treaties do not pretend to be made with sovereign states; one is with the Transvaal Boers, and one with representative delegates of the inhabitants of the Orange River territory. Again, by the Pretoria Convention of 1881, the Commissioners guaranteed that complete self-government would be granted to the inhabitants of the Transvaal territory, and defined the territories. Contrast the language of the London Convention of 1884, which recognises the sovereignty of the Transvaal State. It does not, therefore, seem possible to regard the view of Hall as justified, either in theory or in practice, nor does the instance to which he refers require any such explanation. All that was required for the settlement of the point there mentioned—the exercising of *de facto* sovereignty over parts of Maine, settled after 1790—was the view that territory not in the possession of England before 1783 could not be brought under its actual sovereignty so long as the validity of the title was under ligitation. It does not require Hall's theory of the nature

of partition to explain this case, and it may be added that Halleck (ii., 480), whose opinion as an American author is of peculiar value in this matter, regards such treaties as either express or implicit treaties of cession.

With regard to the administration of the state, it is obvious that in either case of cession or of conquest the administrative authority of the old Government absolutely passes away. The conqueror or the cessionary is obviously not bound to succeed to the form of administration of the conquered or ceding power, save in so far as it may be specially provided for by treaty, when he is of course bound. The successor has normally full legislative, administrative, and judicial authority, and he can exercise it as he likes. It is clear that, as Halleck (ii., 500) points out, none of the previous administrative or public law of the conquered or ceded territory can *proprio vigore* remain in force. The old state is gone and the new state does not succeed to its power. This is fully recognised by Huber (p. 135): "The successor, in the case of the winning of independence, succeeds as little as does a cessionary to the sovereignty of his predecessor"; (p. 148): "The conqueror succeeds as little as the cessionary to the sovereignty of the conquered state, but extends his own sovereignty over it just as in the case of territory ceded to him." The old laws derive any force they have from acquiescence in them by the conqueror or cessionary, which is tantamount to legislation establishing the public laws of the old state as laws for the new territory. In many cases such confirmation is formal; for example, in the case of the conquest of the Orange Free State, Lord Roberts, by Proclamation of 13th March, 1900, ordered the resumption of the Postal and Telegraphic services of the Republic in the conquered territories under the laws hitherto in force. On the 20th March the same principle was applied to the Customs. On the 31st May the Orange River Colony was placed, after annexation on the 24th May, under martial law as that term is usually understood in British colonies. By Proclamation No. 11 of 1900 the occupied parts of the South African Republic were put under military law. By Proclamation No. 19 of 1900 taxes, revenues, dues, etc., were made payable to Her Majesty's Government. After the annexation all the Transvaal was placed under martial law by Proclamation No. 16 of 1900. Finally, Proclamation No. 20 of 1900 declared that all the Courts constituted thereby should have jurisdiction in the case of offences under the common or statute law of the Transvaal, thereby recognising the Transvaal Criminal Law. (For these Proclamations, *see Parliamentary Paper*, Cd. 426.) So a Proclamation No. 17 of 1902 recognises Roman-Dutch law as the common law of the Transvaal, and confirms the statute law of the Transvaal.

It is, of course, a matter not of International Law, but of the public law of each country, the exact extent to which the public law of the conqueror or cessionary extends automatically over the conquered or ceded territory. The rule of English law does not extend the common law of England or any of the statute law, save that which applies to the colonies, to the conquered territory. A new colony falls within the definition of colonies or of British possessions contained in the acts referring to such possessions or colonies, and, of course, its legislation is *pro tanto* invalid so far as it is repugnant to an Imperial law. Further—and this is an interesting point—the legislation of the colony, so far as when it was an independent state it professed to be extra-territorial, will no longer be held in the eyes of the Courts to have such effect, it being a rule of English law that no colonial legislation has extra-territorial effect unless such effect is expressly or by necessary intendment given by an Imperial Act. (*See Powell* v. *Apollo Candle Company*, 10 App. Cas. 282; *Hodge* v. *The Queen*, 9 App. Cas. 117; *Macleod* v. *Attorney-General for N.S.W.*, 1891, A.C. 455; *P.O. Steam Navigation Company* v. *Kingston*, 1903, A.C. 471; *Attorney-General for Canada* v. *Cain*, 1906, A.C. 542.) Halleck (ii., 501) goes further: "Any municipal laws existing in such territory, which are in violation of treaty stipulations, or of the general rules of trade, navigation and shipping, or which give privileges exclusive of other subjects, are not

only void in themselves, but the King even cannot introduce any which are contrary to fundamental principles." This is of doubtful validity. Whether a treaty stipulation overrides a municipal law is a question which the Privy Council has refused to answer (*Walker* v. *Baird*, 1892, A.C. 491; *Damodhar Gordhan* v. *Deoram Kanji*, 1 App. Cas. 352), and which the Transvaal Courts have likewise evaded answering (*cf.* 1903, Transvaal Supreme Court Reports, 15; 1905, Reports, 137).* The answer is probably in the negative in accordance with the general principles of English law, which, as we have seen in Chapter III., are extremely conservative in recognising rules of International Law. In the case of *Postmaster-General* v. *Taute* (1905, Transvaal Supreme Court Reports, 582 *seq.*) Sir J. Rose-Innes laid it down that an action would not lie in a Transvaal Court to enforce a treaty stipulation for the recognition of contractual obligations. The remark was not essential to the decision of the case at issue, but it probably represents the English doctrine on the subject. The general rules of trade, navigation and shipping to which Halleck refers may be [illegible]ed in Imperial statutes, in which case his dictum is no doubt correct, but it is too limited, as repugnance to any Imperial statute invalidates a colonial Act. If the rules are those of English law, not specially applied by statute to the colonies, they certainly do not override colonial legislation, nor would colonial legislation, which conferred privileges exclusive of other subjects, be invalid merely on that ground. Since the enactment of the Colonial Laws Validity Act, 1865, sec. 3, colonial laws can only be invalid if they contravene Imperial legislation applying to the colony. It is sometimes said that they are also invalid if they are in conflict with fundamental principles of law (*see* Lord Mansfield's judgment in *Campbell* v. *Hall*, 20 State Trials, 320), but this rule, which once had a real meaning, is now obsolete, though in the recent discussion of it in *Rand Exploration Company* v. *Nel* (1903, Transvaal Supreme Court Reports, 42), the point was not directly settled, as it was not necessary to the decision of the case. But now, undoubtedly, the King's authority to enact laws is only subordinate to the law of Parliament, and the Legislature of a Crown Colony has all the King's authority if the Letters Patent grant it as they usually do.

In the United States the practice is to permit the President, as supreme commander of the forces of the Republic, to maintain government in conquered territories until Congress decides as to their fate (Halleck, ii., 502). It has been held that revenue laws of the Republic extend to the new territories as soon as the fact of annexation or cession has been notified to the officials there. This decision seems illogical, as it should apparently rather have been held that the revenue laws, if they applied at all, must do so at the instant of cession, but it was due to the great difficulties experienced in communication with the territories in question, when California was ceded by Mexico (*cf.* Phillimore, iii., 873–875).

The established practice, as will be seen in Chapter IX., in regard to the supreme power of legislation, is not to exercise that power unfairly with regard to private rights. But all public and administrative law, ecclesiastical law, and not rarely the laws of criminal and civil procedure, are altered by the conqueror or cessionary. This was so in the case of Sardinia and its acquisitions in 1859 to 1866; in the case of the incorporation of Schleswig-Holstein, the patent of 12th January, 1867, while confirming officers in their posts, and guaranteeing private rights, expressly reserved to the German Emperor the power of legislation, pending the introduction of the Prussian administration. Similar are the patents of 3rd October, 1866, for the annexation of Hanover, Hesse, Nassau, and Frankfurt. By a law of 9th June, 1871, regarding the union of Alsace-Lorraine with the

* The New Zealand Courts appear to consider that questions of Maori claims to lands, depending on treaties with the Crown, are not within their jurisdiction (*Wi Parata* v. *Bishop of Wellington*, 3 N.Z. Jurist, N.S. S.C. 72; Moore, *Act of State in English Law*, pp. 133, 134), and that the treaties give no rights which can be enforced against the Crown. This is the converse case.

German Empire, the Emperor, with the assent of the Bundesrath and the Reichstag, appointed the 1st January, 1873, as the date of the introduction of the German Imperial Administration, and until then the legislative authority was vested in the Emperor, with the consent of the Bundesrath, or, if burdens were to be imposed on the empire by taking over loans, etc., of the Reichstag as well. The Emperor was to have administrative power, subject to the counter-signature of the Imperial Chancellor, who thus became responsible for his orders (Law of 9th June, 1871, secs. 3 and 4).

Similarly, in cases of conquest or cession, Great Britain has freely altered the public and administrative laws, as, for example, in cases of cession at the Cape of Good Hope, in Malta, in Ceylon, in Mauritius, in Hong Kong, in Labuan, and in the ceded West Indian Islands; in cases of annexation in the Transvaal in 1877; in Upper Burma in 1886, and in many cases in India. The fact of conquest or cession introduces the whole doctrine of the prerogative of the Crown into the colonial law. On the other hand, in the case of cession it has always obeyed treaty stipulations, as in the case of British Guiana, where a certain amount of financial control has always been maintained for the colonists in the Court of Policy in accordance with the Dutch practice and the articles of capitulation (*Colonial Office List*, 1904, pp. 89, 90). Similarly, in virtue of the peace terms of Vereeniging of 31st May, 1902, though this was not technically a treaty, the Government of the Transvaal was, by Letters Patent of 31st March, 1905 (*Parliamentary Paper*, Cd. 2400), constituted on a representative basis, it having been provided in the terms that military government in the Transvaal and Orange River Colony should, as soon as possible, be succeeded by civil government, and later on by representative institutions leading up to self-government. So also, in accordance with Art. 8 of these terms, the political franchise has been withheld from Indians or natives, and, in virtue of Art. 9, no special war-tax has been imposed on landed property in the two colonies. Similarly, by Art. 6, it is provided that rifles shall be allowed to those requiring them for their protection on taking out a licence as required by the local law.

In ecclesiastical matters the new state possesses full authority, and is not bound by concordats affecting the ceded or annexed territory. Thus, as Selosse (p. 218) points out, the Germans were not bound by the concordat between France and the Pope after the cession of Alsace-Lorraine. On the other hand, concordats binding the territories of the conqueror or cessionary will extend to the new territories. If by the laws of the cessionary or conqueror religious bodies cannot possess property, then in strict law they lose their property on cession or annexation, and to obviate this result provisions have been inserted in several treaties. Art. 16 of the Treaty of 10th November, 1859, between Austria and France, provides that religious corporations established in Lombardy can dispose freely of their property, movable or immovable, in cases where the new legislation under which they would pass did not authorise the maintenance of such establishments, while Art. 7 of the Treaty of the 23rd August, 1860, between France and Sardinia, assures religious establishments in Savoy and Nice in the continued enjoyment of their property. Germany permitted French bishops to exercise authority over Alsace-Lorraine until final arrangements had been made for regulating the boundaries of the dioceses in 1871 (Art. 6 of Treaty of 10th May, 1871, and Art. 9 of Treaty of 11th December, 1871). In former times treaties frequently contained provisions for the free exercise of certain religions, but these are now, owing to the rise of religious toleration, mostly antiquated. Yet it is provided for expressly in the United States Treaty of the 10th December, 1898, with Spain, and in both the Transvaal Conventions of 1881, Art. 16, and of 1884, Art. 9, the British Government stipulated for the freedom of religion in the Transvaal, in so far as such freedom was not inconsistent with morality and good order. Further, in the Aliwal-North Convention of 1869, provision was

made for the maintenance of certain French Missions (Art. 7), in view of the expulsion of certain French missionaries by the Orange Free State Government in 1865 (*see* F. Coillard, *On the Threshold of Central Africa*, Introduction, p. xxii.). These stipulations show clearly that the legal right of expulsion normally exists, though the sense of Europe is that freedom of religion should be allowed, as is shown by the Treaty of the 29th March, 1864, regarding the Ionian Islands, to which all the great Powers were parties.

Similarly, it is open to the conqueror or cessionary to introduce slavery as a status in the new territories. The British Government has frequently stipulated in South African treaties against slavery. Such provisions will be found in the Sand River Convention, 1852, Art. 4; the Bloemfontein Convention of 1854, Art. 7; the Pretoria Convention of 1881, Art. 15, and the London Convention of 1884, Art. 8.

The conqueror or cessionary may also alter the official language of the country, save so in far as he is bound by treaty, and may change its educational system. The British Government is bound by the terms of peace of 31st May, 1902, Art 5, to permit the teaching of Dutch in the schools in the Transvaal and Orange River Colony if the parents so desire, and to permit the use of Dutch in the courts of law when necessary for the proper administration of justice. In the case of the Cape, on the other hand, no such stipulation was made at the time of cession, and the use of Dutch as an official language was entirely given up, until revived by a comparatively recent act of the Colonial Legislature.

Further, any rights of sovereignty exercised by private persons pass to the cessionary or conquering state unless specially preserved by treaty. For example, private rights of jurisdiction would not normally be recognised by a conqueror or cessionary whose law required that all jurisdiction should be exercised by the state. Huber (p. 60) says: "Rights which are a mixture of public and private rights perish so far as they are public in cases where the succeeding state does not possess a corresponding institution. If it possesses rules which apply to the case they will in the future govern the matter, as for example, in the case of fiefs, knightly property, guilds with compulsory powers, rights of mill, sale monopolies, patronage, schools, saleable appointments, rights to mint coin, and postal rights belonging to private individuals, exemptions from military service," etc. Westlake (i., 82) quotes this passage with approval. Many of these points can hardly arise when, as now, public rights are rarely in the hands of individuals, but clearly, when they do arise, the fact that they are private rights under the old Government brings them, to some extent, under the rule of private property, and in accordance with that rule we would expect to find that, while the rights themselves cannot be claimed under the new Government, as they are *ipso jure* extinguished, the owners ought to receive compensation. No absolute right to compensation can exist because it is an admitted rule of public law that the state may confiscate without compensation even what it recognises as under its own laws private property, but just as expediency usually requires that compensation be paid for confiscation of private property, so in this case also compensation would normally be paid. To take a case put by Selosse (p. 214), if a private person owns a school in a state which is annexed or ceded the conqueror or cessionary does not recognise private schools, though he has no legal he has a moral claim to consideration. So by a law of 10th June, 1872, Germany granted full compensation to holders of saleable offices in the judicial administration of Alsace-Lorraine in respect of the abolition of their rights of sale, even when those officers opted for French nationality. But the right is not a legal one, and depends on the will of the cessionary or conqueror in the absence of express treaty stipulation.

One of the most important questions in regard to the change of administration is that of taking over officers. According to Huber (pp. 123, 127), the theory is that

the cessionary takes over in their corresponding ranks the civil servants of the old Government if they become his subjects and do not opt for their old nationality. If the administrative system of the cessionary is not compatible with their continuance in office, or if he does not desire to retain their services, he must pension them according to his pension laws, for by not opting for their old nationality they have decided to accept pensions from him on the scale used by him for his own servants. If they opt for the ceding state they remain its servants and must be pensioned by it. The act of cession ends their powers, but the silence of the cessionary gives them a new authority in all cases save of high police officials, etc., whose position is a matter of special trust. If under the terms of his appointment an official is irremovable, he remains irremovable under the new state unless its public laws forbid, in which case he must be indemnified. Similarly an indemnity must be paid to an official who loses his office through the change of state. Municipal officials are unaffected by the change.

These rules are supported by a certain amount of practice and treaty authority, but their very nature shows that we cannot speak here of a rule of law. A Prussian Patent of 22nd May, 1815, secured the rights of all officials in the ceded parts of Saxony; a Patent of 13th September, 1865, the rights of officials in Lauenberg; and Patents of 3rd October, 1866, and 12th January, 1867, secured similar privileges for the officers of Hanover, Hesse, Nassau, Frankfurt and Schleswig-Holstein. By Art. 2 of the Treaty of 11th December, 1871, Germany contracted to secure in their old rights any officials whose appointments it might confirm, and it had earlier offered to secure individuals in their posts if they would loyally accept the offer (Proclamation by Count Bismarck Bohlen, of 30th August, 1870). So by a decree of the National Assembly of the Ionian Islands of the 19th October, 1863, all the officials were confirmed in their offices. Similar provisions occur in the treaties of 10th November, 1859, and 3rd October, 1866, regarding Austria and Italy, and in the treaty of 23rd August, 1860, for the cession of Savoy and Nice, but in these cases the pensions of officers not re-employed is to be reckoned according to the scale of pensions in the ceded state, not according to the scale in the cessionary.

But, of course, in a case of annexation this result cannot be expected. Even in the case of cession there would be no obligation on the cessionary in the absence of treaty stipulations to employ the old officials, and in annexation their employment cannot be essential. The French Government were unable to insist on Germany taking over all the French officials in 1871, even in the case of cession. In the case of the Transvaal in 1877 Great Britain only employed certain of the old officials, whence much ill-feeling resulted. On the annexation of Upper Burma in 1886, it was impossible (*see Parliamentary Paper*, C. 4889) to make much use of the old officials, and a new administration had to be created. The same remark applies to the Transvaal and Free State in 1900. Many of the old officials were Hollanders and fled before the arrival of the British troops, and so a new civil service had to be created out of ex-soldiers and volunteers and Cape officials, though eventually not a few of the old officials received posts.

In the case of soldiers the rules laid down by Huber (pp. 126, 127) are that, if the soldiers are conscripts and belonged to a ceded territory, they pass to the sovereign of that territory because of his right to the service of his new subjects, not by succession. If the soldiers are mercenaries and also born in the territories ceded, he can claim their services, but in such cases an option is secured by treaty. If they are foreign mercenaries, they belong to the ceding power. In the case of officers, the same rules apply as in the case of native mercenaries. In the case of annexation (p. 160) the troops pass to the annexing power, officers retaining their rank, etc., and being only removable according to the laws of the successor. Further, Huber (p. 59) lays down that, if a subject of a ceding power has already completed his military service, he cannot be called upon to serve further, even if

the period of service in the new state is longer than the period of service has been in the old, and any part already served must be counted in his favour. If, however, they have not served at all, they have no claim to be allowed to serve only so long as the laws of their old state require.

The foregoing rules are based on treaties of which the most important are those of Zürich of 10th November, 1859 (Art. 13); of 30th October, 1864 (Art. 18), between Austria, Prussia, and Denmark; and of 3rd October, 1866 (Arts. 15 and 16), between Austria and Italy. In 1871, however, the principle adopted was that the French of Alsace-Lorraine remained French soldiers until they opted for German nationality. In most cases of recent treaties, the soldier is allowed to opt for his own nationality, and, even in early treaties, this is practically always the case as regards officers. Clearly this is a matter for treaty stipulations. In the case of annexation we do not find any succession whatever. Neither in 1877, nor in 1886, nor in 1900 did Great Britain make any claim to regard the armed forces of the conquered countries as becoming hers by the annexation, and it is clear that no such claim could properly be made. The civil and the military services of the conquered country are part of the system which is overthrown; the conqueror may build with the same materials, but a succession is an absurdity. Any idea that previous service would be taken into account in fixing the term of services to be undergone, if compulsory service is introduced by the conquering state, is peculiarly improbable and shows the scholastic nature of the doctrine.

Selosse (pp. 201 *seq.*) maintains that the relation between soldier and the state in the case of officers or mercenaries is a contractual one, and urges that succession must follow, as the state cannot denounce its side of the contract without compensation. This view is, however, hardly tenable. There has never been any contract between him and the new state, and his only remedy must be against his former master. As a rule this remedy would not be of any value. It is a maxim of English and colonial law that practically any public servant holds at pleasure, and can be dismissed by the sovereign without cause assigned (*Dunn* v. *Regina*, L.R. 1896, Q.B. 116). The termination of the existence of the need for his services through the cession would be undoubtedly a sufficient ground for his dismissal.

With regard to the jurisdiction of the courts of the cessionary or conqueror it must be held that all previous jurisdiction falls to the ground from the date of cession or conquest, and that the courts of the cessionary or conqueror are alone competent to deal with cases regarding the ceded or conquered territory. And it is clear that the courts of the conqueror or cessionary are not bound by decisions of their predecessors, even in countries which have adopted the rule of *stare placitis*. This is illustrated by the judgment of the Supreme Court of the Transvaal in *Habib Motan* v. *The Transvaal Government* (1904, Supreme Court Reports, 404; *Parliamentary Paper*, Cd. 2239, pp. 46, 48). The Transvaal Courts had held that a law, No. 3 of 1885, had authorised the Government to confine Indians to locations for residence and trade, and the British Government endeavoured to enforce the law. The plaintiff demanded that a licence should be granted to him to trade outside a location, and the Supreme Court decided in his favour. Sir J. Rose-Innes, C.J., said: "I do not think that we are bound to follow these decisions (*i.e.*, of the late High Court of the Transvaal). In the *London Tramway Co.* v. *London County Council* it was held that a decision of the House of Lords upon a point of law was decisive and binding, and the Lord Chancellor is reported to have said that 'nothing but an Act of Parliament can set right that which is alleged to be wrong in a judgment of this House.' I venture to think that it is stating the doctrine somewhat too widely to say that it is illegal or impossible for a Court to reverse its own findings on questions of law. . . . However, a Court of Law should be bound by its own decisions, unless and until they are

overruled by a higher tribunal on appeal. To adopt any other rule would be to impair the dignity of the Court, and would introduce a fatal uncertainty into business transactions and legal proceedings, but this court is not, in the full sense of the term, the successor of the High Court, and the decisions of the latter upon legal matters, though we regard them with the highest respect and would differ from them only with the greatest reluctance, do not stand, as far as we are concerned, on the same footing as our own. They are the decisions of a different Court, and although the same system of law is common to both tribunals, we are bound by the rule of the Privy Council in the past as well as in the future, whereas the High Court was not." This case (*cf. also Jolly* v. *Herman's Executors*, 1903, Reports, 515; *Guinsberg* v. *Scholtz, Robertshaw & Kelly, ibid.*, 737) illustrates the fact that the Transvaal Courts will reverse a previous judgment of the High Court of the South African Republic without having the authority of the Privy Council to fall back on. A case has already arisen in which the judgment of the High Court has been overruled by the Supreme Court on the ground of a decision of the Privy Council. In the case of *Murphy* v. *Murphy* (1902, Transvaal Supreme Courts Reports, 179) the court overruled the case of *Weatherly* v. *Weatherly* (Kotze's Reports, p. 66), decided by Chief Justice Kotze, on the ground that the Privy Council in *Le Mesurier* v. *Le Mesurier* (1895, A.C. 517) had laid it down that no Court could divorce parties who were not domiciled in the country where was its sphere of jurisdiction. So the Fiji High Court is not a successor of any earlier Court, *Robertson* v. *Hennings* (Fiji Law Reports, 1 *seq.*).

In cases of cession the inconvenience of maintaining the worthlessness of all legal steps anterior to the cession, in cases where they have not resulted in a definite judgment, which would, of course, not be affected by the cession, has often been mitigated by treaty stipulations. As there is nothing of theoretic interest in these stipulations it may be sufficient to refer to two recent cases. Art. 3 of the Treaty of 11th December, 1871, between France and Germany, provided that (i.) Every judgment by French Courts between French citizens, having the authority of a *res judicata* before 20th May, 1871, should be considered as definite and in full force in the ceded territories; (ii.) No plea of lack of jurisdiction by reason of change of frontiers should be raised against judgments of a Civil Court or Court of Appeal pronounced before the 20th May, 1871, which at that time were susceptible to an appeal to the Court of Appeal or Court of Cassation respectively; (iii.) The settlement of processes in matters not personal should appertain to the Court in whose jurisdiction the object was situated; (iv.) The court of the defendant's domicile alone could determine cases regarding personal matters which were proceeding before a court of first instance; (v.) The same rules should be applied to processes decided in courts of first or second instance which had not yet the force of a *res judicata*, but against which appeals or applications for cassation had not been lodged until after 20th May, 1871; and (vi.) As regards cases under appeal or reference to the Court of Cassation before 20th May, 1871, they were to be decided by the Courts before which they were, unless, by reason of the annexation, both parties found themselves in personal matters subject to the Courts of the other state.

In the case of the Treaty of the 10th December, 1898, between Spain and the United States, it was provided (Art. 12): (i.) Judgments rendered either in civil suits between private individuals or in criminal matters before the exchange of ratifications and in respect to which there is no recourse or right of revision under the Spanish law, shall be deemed to be final and shall be executed in due form by competent authority in the territory within which such judgments should be carried out; (ii.) Civil suits between private individuals, which may on the date mentioned be undetermined, shall be prosecuted to judgment before the Court in which they may then be pending, or in the court that may be substituted therefor; (iii.) Criminal actions pending on the date mentioned before the Supreme Court of

Spain against citizens of the territory, which by the treaty ceases to be Spanish, shall continue under its jurisdiction until final judgment, but such judgment having been rendered the execution thereof shall be committed to the competent authority of the place in which the case arose.

In the case of conquest the British practice is that proceedings should, so far as they are incomplete at the time of annexation, be commenced anew, while so far as they are complete, they are recognised. Thus, by Proclamation No. 14 of 1901 it was laid down that the High Court of the Transvaal should have jurisdiction in all civil causes, and proceedings arising within the colony, or which had arisen in the Transvaal prior to the annexation, provided that the Court should not exercise any jurisdiction where the cause of action was prior to the date of annexation, unless the defendant had been served with the process of the Court (sec. 16). On the other hand, when in a libel action the Court of the Republic had granted an injunction against the publication of a pamphlet, the order was repeated when the case came before the British Court in 1905 (1905, Witwatersrand Court Reports, 44) on the ground that it was a final judgment, though the Court would normally not have made such an order.

The effect of the annexation of the Vryheid District of the Transvaal to Natal was considered in the case of *Rex* v. *De Jager* (1903, Transvaal Supreme Court Reports, 36). A crime was committed in Vryheid and the accused was committed for trial before the special Criminal Court at Pretoria. The trial came on on 2nd February, 1903, when, by the Letters Patent of 26th January, 1903, the district of Vryheid had been annexed to Natal. The Court felt itself competent to try the accused on the ground that the *locus delicti commissi* and the *locus deprehensionis* brought her within their jurisdiction. The conclusion seems a reasonable one.

The logical consequence of the transfer of the administration of a conquered or ceded territory is that the predecessor cannot have any authority in it subsequent to the date of the transfer. In the case of peaceful cession the date of the transfer must be that specified by the treaty of cession. The situation seems, however, different in the case of conquest followed by cession, or in the case of annexation. On the doctrine of state succession as a universal succession it would seem that the successor must step into the place of the preceding Government with effect from the date on which the annexation was declared or the date of the treaty of cession (*cf.* Halleck, ii., 484, 485). On the other hand, Governments have gone beyond this principle, and have declined to recognise acts of their predecessors subsequent to the date of the declaration of war, or the date of the effective occupation of the conquered territory (*cf.* Halleck, ii., 471). The German Government specified 4th September, 1870, the day of the downfall of the Empire, as the last date up to which laws passed by France would apply to Alsace-Lorraine, but the German Courts considered that laws issued by France since the outbreak of war could not bind districts occupied by German troops at the date of the issue of the law. Diplomas issued by the French Government after 26th February, 1871, were not recognised by the Government of Alsace-Lorraine; those issued previously were. Great Britain, by notice of 26th January, 1900 (*Parliamentary Paper*, Cd. 53), intimated that Her Majesty's Government would not recognise, as valid or effectual, any forfeiture of any property situated in the South African Republic or the Orange Free State or any charges or incumbrances levied on such property since the 10th October, 1899. This was due to the fact that the Governments of the Republics were expected to confiscate and raise sums on the properties of British subjects situated in the Republics. A further notice of 19th March, 1900 (*Parliamentary Paper*, Cd. 128) stated that no alienation of properties in either Republic, including railways, lands, and mining rights, would be regarded as valid if made subsequent to the date of the proclamation. This was made law after the annexation by Proclamation No. 26

of 1901. This was a strong step to take, but the ground, of course, was that the alienations were not made *bonâ fide*. On the other hand, in the case of the peaceful cession of Florida to the United States, it was held that the jurisdiction and authority of the former sovereign continued in full force until possession of the ceded territory had actually passed, and that an importation of goods into the Floridas after the cession, but anterior to the delivery of possession, was not an affront to the United States Government (Wharton, i., 17, 18). So an adjudication by a Spanish Court before the actual possession of Louisiana was handed over, though subsequent to the cession, was held valid (*ibid.*, 24). On the other hand, a patent dated before, but not delivered until after, the ratification of the treaty for the cession of the Mississippi territory to the United States was not valid, nor a grant of contested territory made *flagrante bello* by the party defeated in the war, save if confirmed by the treaty (*ibid.*). It remains therefore, apparently, for the successor whether he will date back his conquest to the beginning of the war, or to his effective occupation. This, however, is hardly compatible with the doctrine of universal succession.

Though the doctrine that from the date of annexation the old Government ceases to have any powers is generally accepted, notice must be taken of some judgments of the High Court of the Orange River Colony, which maintain that the administrative acts of the forces of the Orange River Colony in the field after the annexation of 24th May, 1900, could be considered as acts of a legitimate Government. In the case of *Wessels* v. *Olivier* (1903, Orange River Colony Reports, 43–50), the question was one of the ownership of a horse which belonged to the wife of a surrendered burgher, and was commandeered by order of Commandant Prinsloo. After the war the owner endeavoured to recover it from the person to whom it had been given by the Commandant. The case was decided for her by the High Court on the ground that the commandeering was illegal, because by Law 10 of 1899, the field-cornet, and not the commandant, was the proper person to commandeer; that is, it was held that Law 10 of 1899 still bound the Orange Free State Government after annexation, and would receive judicial notice from the Courts. This remarkable position was supported on appeal by the Supreme Court of the Transvaal. It is true that Sir J. Rose-Innes, C.J., admitted that after the annexation the only Government which could be recognised was the British Government, as decided in *Van Deventer* v. *Hancke and Mossop* (1903, Transvaal Supreme Court Reports, 401), but, as in that case, he held that the rights of the old Governments to appropriate property were governed by the laws existing before the date of annexation, though he confined the operations of these laws to persons who were not British subjects. As the provisions of Law No. 10 had not been complied with, the appropriation, he held, was on that ground illegal. So, again, in the case of *Lemkuhl* v. *Kock* (1903, Orange River Colony Reports, 20–22, 73–78), where Lemkuhl sued for the return of a horse which had been confiscated because of his joining the British and had been given to Kock, the Resident Magistrate at Bethlehem actually decided the case on the ground that the confiscation by the order of the Boer Krijsraad, and signed by the State President after the date of annexation, was one which could be recognised by the Court. The High Court at Bloemfontein held the decision good, not on this extraordinary ground, but on the ground that by taking the oath of allegiance to the British Crown, Lemkuhl had become a rebel to the Orange Free State, and they quoted the case of *Neumata* v. *Matwa and others* (2 Eastern Districts of Cape Reports, 272), where a Cape Court had held that a rebel's property could be captured in time of war in the same way as that of an enemy. They apparently saw no difference between a British Court such as they were judging in the case of a rebellion against the old Government, which had been extinguished by the annexation, and a British Court, as in the Cape case, judging rebels against a British Government, and they proceeded to decide the case on the ground that a British subject could be held a

rebel by a British Court for joining the British. The Supreme Court of the Transvaal, on appeal, fortunately saw the absurdity of this position, and settled against Lemkuhl on the only possible ground, viz., that the Boer forces were belligerents, and that a seizure by them for war purposes, as distinguished from a mere confiscation as in Van Deventer's case, would be an act legitimate by International Law, and that, therefore, the property of the owner being divested, the ownership of Kock was to be upheld. The doctrine of *postliminium* was not raised, but it may well be that the decision was right on the merits, and, in any case, it has the great merit of recognising the supremacy of the British Government after the annexation. The validity of Law No. 10, even after the annexation, was not questioned also in *Visser* v. *Nieuwondt* (1903, Orange River Colony Reports, 40).

There can be no doubt but that the recognition of any of the acts of the late administration as legal under a law of the late state was quite contrary to every sound maxim of International Law. The Boers were belligerents, but the existence of a law amongst them could have no meaning for the Courts of a British colony. If, in any case of invasion, a belligerent does acts, these acts in their civil results in the country where the act is done depend, when tried in the courts of that country, not on the validity of rules of law existing among the belligerents, but on the validity of the acts according to International Law regarding belligerency, or the Municipal Law administered by the Court, if that law disagreed with International Law. The Orange River Colony Court confused its position as a British Court with the position of a Court held by authority of the Boer forces, which would, no doubt, have regarded the annexation as non-existent.

The case of *Van Deventer* v. *Hancke and Mossop*, above referred to, is of great interest as showing the views of the Supreme Court of the Transvaal as to the effect of the annexation. Two Boers, Hancke and Mossop, were permitted by the Boer General in March, 1901, to remain on their farms because of ill-health. Soon after, they were captured and deported by a British column, whereupon Field-Cornet Schutz confiscated some wool on their farms and sold it to Van Deventer. After the war was over the defendants claimed the wool and obtained an interdict against Van Deventer, who was compelled to bring an action for its recovery. The plaintiff rested on three grounds: (i.) That the confiscation was justified by an Executive resolution of 26th December, 1900, confirming a Krijsraad resolution of 24th May, 1900, passed by virtue of a Volksraad besluit of 28th September, 1899; (ii.) That the troops of the Boers in the field were governed by martial law, and the act was within the powers of officers acting under martial law, and the act of confiscation, not being open to question, the sale was valid against the world; (iii.) That Ordinance No. 22 of 1903, which enacted Art. 4 of the Vereeniging terms of peace, forbade persons being disturbed in person or property for the acts of the war. This last point was obviously straining the terms of peace and was not upheld by the Court. The defendants replied that as to (i.) the Executive resolution of 26th December, 1900, could not be recognised by a British Court, since the Transvaal was annexed on the 1st September, 1900; and as to (ii.) that the martial law rights of the Boer Commanders were regulated by Law No. 20 of 1898, and that they did not permit confiscation in such a case as this. The Court decided against the plaintiff on different grounds. Sir J. Rose-Innes, C.J., accepted the defence as set out by the defendants. He discussed the argument that the annexation proclamation was premature, and dismissed it as impossible to be urged in a British court, quoting *Secretary of State for India* v. *Kamachee Boye Sahiba* (13 Moore, P.C. 22), and rejecting the argument from the articles of peace of 31st May, 1902. With regard to the question of the martial law powers of the Boer leaders, he said, "The question is whether the leaders of that community could . . . deal with the property of its members without their consent, and whether the Court should recognise such dealing or give effect to its consequences. Without deciding this point, I shall, for the purposes of this case, assume

that they could so deal with the property of those over whom they exercise control. But, clearly, they could exercise such power to no greater extent than would have been possible if there had been no annexation, and if the Republican Government had still been in existence at Pretoria." On this basis he decided that Law No. 20 of 1898 did not permit confiscation as a punishment for the offence supposed (without, in his opinion, good ground) to have been committed by Hancke and Mossop. Mason, J. (pp. 416–423), declined to express any opinion on the act of annexation, and he was against the plaintiff on other grounds. "The Government of the South African Republic, after annexation, either ceased to exist or continued as a Government *de facto* or *de jure*. If the former were the case then the confiscation was invalid, and if the latter then that Government is subject to laws which it made for itself, or, at any rate, cannot have greater rights than its alleged constitution confers." Again—"Belligerent rights are rights against the enemy, not rights of the belligerents *inter se*. These are governed by the municipal law of each belligerent (*Williams* v. *Bruffy*, 96 United States Reports, 177; *Dewing* v. *Perdicaries*, 96 United States Reports, 193; *Re Venice*, 2 Wall 258). That municipal law may be contained in special statutes or military codes applicable in time of war, or may be comprised under the wider and less defined jurisdiction of martial law as understood in British jurisprudence. It is, I think, quite clear* that where there are definite provisions of military law applying to military offences, these provisions exclude the operation of martial law in those particular cases (*Planters' Bank* v. *Union Bank*, 16 Wall 483; *Mrs. Alexander's Cotton*, 2 Wall 405)." He then discusses the law of the belligerent Boers, and finds it in Law No. 20 of 1898, and perhaps the Krijsraad's resolution of 24th May, 1900, neither of which covers the point at issue; and, deciding that Ordinance No. 22 of 1903 was not in point (p. 423), he gave judgment for the defendants. Bristowe, J. (pp. 423–427), held that the terms of peace recognised a *de facto* Government, that is, a community, and therefore some laws binding them *inter se*. Their law was probably not a vague martial law, but their old laws, and these laws consisted of Law No. 20 of 1898, which did not authorise confiscation, and the Resolution of 24th May, 1900, which, even, if valid, did not cover the point. He also, therefore, gave judgment for the defendants.

These judgments are not to my mind satisfactory. There is some force in Mr. Smuts' remarks for the plaintiff (p. 407): "The defendants' arguments land them on the horns of a dilemma. Either the annexation abolished the Boer state, government, law, etc., or it left the Boer laws to regulate the relations of the Boers *inter se*. In the first case, nothing remained except the ordinary belligerent rights under International Law, and it cannot be argued that the Commandant-General had no general authority over the burghers under him. In the second case, the officers could validly act under the Executive Council Resolution (of 24th May, 1900)."

The fact is that the attitude of the judges was somewhat illogical. They were not prepared to state boldly that laws of the South African Republic, passed subsequent to the annexation, were the law of the land for them to administer, but, in effect they, being a British Court, undertook to decide questions of belligerents *inter se* by the law of these belligerents, or, putting it in a simple form, were prepared, had the law of the South African Republic authorised it clearly (for Mason and Bristowe, JJ., both recognised the Resolution of 24th May, 1900, as binding, although the Chief Justice avoided doing so) to use the machinery of a British Court to carry out confiscation decreed by belligerents against persons who had surrendered to their lawful Government, as the Colonial Government was since the annexation. So put, the position seems absurd. From

* This doctrine can hardly be accepted. Martial law over-rides all law, and would over-ride military law if need be.

another point of view, they were prepared to recognise the judgment, or act, of the Court of a belligerent, as being of the same value as the judgment of the Court of a foreign country (*cf.* especially the judgment of Mason, J., at p. 422). Now, however great the respect paid to foreign judgments, I do not think that any Court would regard as of any validity a judgment even between belligerents of a Court held by belligerents on its territory in direct derogation of its rights of sovereignty. At any rate, it would certainly not allow a suit to be brought to enforce it, even in the ordinary case of a belligerent being a foreign state, whose judgments it usually respected. But, when the belligerents had no state, but were a mere body of fighting men, then the idea, that British Courts should permit judgments to be enforced when given by the Courts of the belligerents, appears absurd. The doctrine might be considered less intolerable, if it were confined to judgments of belligerents strictly *inter se*, but when one party is a prisoner, to permit belligerents to confiscate his property as a punishment is preposterous. The rights of belligerents, as a matter of fact, should be judged strictly as a matter of International Law, and on the basis of that law it is certain that no such confiscation of property would now be allowed to be enforced in the courts of the conqueror. Hancke and Mossop were British subjects, under the protection of the British crown when the property was confiscated, and it would hardly now be held that any belligerent could confiscate the property of an individual among his enemies, and have that confiscation upheld in his enemy's courts. He can take goods for purely war purposes, and the taking is valid at International Law, though, under the Hague Convention it is desirable that he should pay for them, but in this case the wool was confiscated, and not taken for war purposes at all.

The ground for the non-recognition of belligerent judgments is that the belligerent is not a state exercising sovereignty in its own territories, or, in other words, that such judgments are a negation of the territorial sovereignty of the state in which it cannot be expected to acquiesce. Belligerent acts can only be recognised by the state in so far as they are justified by International Law. The case of the United States, and the Confederated States, is consistent with this view. The states of the Confederation were not mere belligerents. They all had constitutions and legislative powers of their own, and their action, so far as it was state action, and within the limits of their constitutions, could not be impaired by their action in breaking away from the Union. The United States took up the view, after the conquest of the Confederated States, that all their acts should be recognised in which their action was legitimate under their constitutions, and did not impair the supremacy of the national authority, or infringe the rights of citizens under the Constitution of the United States (*Texas* v. *White*, 7 Wall 700). That is to say, the United States recognised the legislative and judicial action of the states, so far as (*a*) they did not usurp the legislative powers of Congress, or (*b*) violate the rights of citizens under the Federal Constitution, which is precisely what the federal Courts would do in times of peace.

There is yet another case, that of *Alexander* v. *Pfau* (1902, Transvaal Supreme Court Reports, 155 *seq.*), which, though rightly decided, appears to rest in part on unsound grounds. The plaintiff was a British subject, whose pony was commandeered in due course during the war, and came eventually for valuable consideration into the hands of the defendant. At the end of the war, he endeavoured to recover the pony. The only ground on which he could have succeeded would have been if he could have shown that the laws of belligerency did not permit such a commandeering* of a British subject's goods. He failed

* In the Cape cases, *Du Toit* v. *Marais* (13 *Cape Times* Reports, 139) and *Johnson* v. *Van der Walt* (*ibid.*, 931), the converse case of commandeering by the British forces was considered, but not decided. It appeared clear, however, that the Supreme Court would not readily assume any change in ownership.

to do so, but the defence rested partly on the ground that the property had been confiscated as an enemy's property in accordance with the alleged general rule of law, that the property of an enemy may be confiscated in time of war (*cf.* Wheaton, ed. Boyd, para. 300; Bluntschli, para. 652; Hall, p. 438). This ground was not upheld, as there was no evidence of the Boer Government ever having decreed the confiscation of enemy's property. It was discussed, therefore, by the Court as a case of commandeering, and was decided by Sir J. Rose-Innes, C.J., on the ground of Law No. 20 of 1898. The judgment of Wessels, J., at p. 164, expressly held that "this Court continues the functions of the late Court, and is bound to apply the law of the Transvaal, as it existed when the seizure was made. . . . Whatever the rule of International Law may be, the local law of the late South African Republic must be followed in preference to a conflicting rule of International Law." He added, however, that in this case he thought that by virtue of the *jus eminentis dominii*, the executive government of the Transvaal could expropriate property suitable to be used for offensive or defensive purposes, whether such property belonged to a burgher or to a British subject, and that the property in question in the case belonged to that class. Smith, J. (pp. 165–168), decided the case on the ground that the Krijswet of 1898 clearly covered it, and that the law was not in contradiction of International Law, thus avoiding the discussion of the question of the relation of Municipal Law to International Law.

This case differs from that of *Van Deventer* v. *Hancke and Mossop*, in that the act concerned took place before the annexation, and was, therefore, not affected by the annexation. It is probable that the rule of International Law now prohibits confiscation of an enemy's property, and if so, the question arises whether the court should have recognised the acts of the South African Republic, when its existence as a state was not formally denied by His Majesty's Government as being regulated by its own rules regarding warfare, or whether it should have declined to accept such rules, save in so far as they coincided with what the Court held to be International Law. The question may be put in a wider aspect. In matters of private International Law, when a question arises, as to the recognition to be given to the acts or judgments of a belligerent state, in a matter arising out of the war, is a state to accept those acts or judgments only if they conform to its own views of International Law? The question does not appear to have been much discussed, and certainly still remains for settlement by British Courts. It may be interesting to compare the case of the authority exercised in criminal cases in a conquered territory, by a conqueror who is in occupation before he has annexed that territory, as to which Halleck (ii., 452), says: "It must be remembered, that the authority of such tribunals has its source, not in the laws of the conquering, nor in those of the conquered state, but, like any other powers of the government of military occupation in the laws of war, and in all cases not provided for by the law actually in force in the conquered territory, such tribunals must be governed and guided by the principles of universal public jurisprudence." In the case of *Wolff* v. *Oxholm* (6 M. & S., 92), the King's Bench adopted the view that it would only recognise the acts of the Danish Government so far as they conformed to International Law, and though its view as to the rule of International Law was perhaps wrong at the time the decision was given, the principle of the decision appears quite sound (*cf.* Moore, *Act of State in English Law*, pp. 141–143).

CHAPTER VI.

STATE SUCCESSION WITH REGARD TO NATIONALITY.

We have now to examine state succession with regard to nationality. The literature on the subject is extensive (*see* especially Cogordan, *La Nationalité*, ed. 2) but it is mainly occupied with details regarding interpretation of treaty stipulations, and throws but little light on the point of importance to us, viz., what is (*a*) apart from special treaty provisions the international common law regarding change of nationality on cession, and (*b*) the common law regarding change of nationality on conquest.

(*a*) In the former case, on the theory of universal succession, it would appear that on a cession the cessionary would obtain *ipso facto* the allegiance of (*a*) all persons born in the ceded territories and residing therein at the date of the treaty; (*b*) all persons born there even if residing outside; and (*c*) all persons subjects of the ceding state residing there at the date of the treaty, or other date on which the treaty came into force with full effect. Usually, the date will be the date of the treaty or the date of ratification, or it may be a later date if so appointed in the treaty, for though prior to ratification a treaty is naturally, as regards present rights, merely an agreement which need not be confirmed, yet on ratification the national character of ceded territory reverts back to the date of the treaty; of course it may be stipulated otherwise, but the general rule of public law is that a treaty is binding on the contracting parties from the date of its signature. (*See* Wheaton, p. 376; Wharton, ii., 27, 28; Hall, p. 334; Westlake, i., 280, 281). On the theory of singular succession, it appears to me that it would be held that the cession alters the nationality of those subjects only of the ceding state, who, whether being natives of the ceded lands or not, are there resident, not necessarily domiciled, at the date of the operation of the treaty; that is, it does not affect persons born in the ceded territories who are residing elsewhere, though, of course, it does so affect them if, being more or less accidentally absent at the moment of annexation, they return there to live. This is submitted to be the correct doctrine, and may be compared with what appears to be the correct doctrine in cases of conquest, which is developed below. But in practice there must be noted a difference between the two cases. The residence of a citizen of a conquered country at the time of conquest must practically always imply domicile as well as nationality, for it is hardly probable that a man, *e.g.*, a Transvaal burgher and residing there at the time of annexation, could fail to be domiciled there. But, if a territory is ceded, mere presence there on the date of cession, especially if the territory is part of a continental country, will hardly impute domicile, it being often merely accidental presence. In such a case it would be monstrous to impose the new nationality, so that the rule we lay down might well be altered for practical purposes to this:—Cession *ipso facto* alters the nationality of all persons, subjects of the ceding state, domiciled in and present in the ceded territory on the date of the taking effect of the cession and such persons domiciled, but not being present in it on that date, if they return to it soon after the cession.

As a matter of history it appears that, up to the capitulation of Arras in 1640, the cession was sufficient to carry the allegiance of the absent as well as the present. It is just worth noting that at that time domicile and nationality practically concurred far more than they do now, when living abroad is not rare. But, at any rate, in modern times the principle more usually applied is that of domicile. This seems perfectly fair and natural; even if at the time of cession

not actually present a man domiciled there will naturally return to stay there. Of course, the domicile referred to must be a genuine domicile acquired by residence and not one of the artificial domiciles such as domicile of origin (*cf.* Dicey, *Conflict of Laws*, Chapter III.). This was laid down as the rule for France by Pothier, and by the Courts for England in *Doe* v. *Acklam* (2 B. & C. 779) and other cases cited by Halleck (ii., 488, n.), and by Westlake (i., 72, n. 2). The treaties of Ryswick (1668), Utrecht (1713), Campo Formio (1797), and, perhaps, of Zürich (10th November, 1859), all recognise it, inasmuch as they require inhabitants (meaning persons domiciled—*see* Westlake, i., 72) of the ceded territories to opt for their old nationality on pain of losing it if they do not so opt. In the Treaty of Turin (1860), however, all Sardinian subjects who were (*a*) domiciled in Savoy and Nice, or (*b*) had been born there, whether domiciled or not, were transferred, whether resident or not in Savoy or Nice at the time of cession to France unless they opted and established their domicile in Italy, if it were not there already, and after a long wrangle with the German Government (*see* Cogordan, pp. 340 *seq.*; Westlake, i., 73, n. 2) Art. 2 of the Treaty of 10th May, 1871, and Art. 1 of the Treaty of the 11th December, 1871, were interpreted as providing similarly in the case of Alsace-Lorraine, though the wording of Art. 2 is almost unintelligible, and, literally taken, seems to refer only to natives of the territories ceded who were domiciled there at the time of the treaty. In the case of the cession of St. Bartholomew by Sweden to France in 1877, domicile alone was taken into account, and, doubtless, there is much that is reasonable in this view. Similar to the Treaty of Turin are the provisions of 2nd February, 1861 (Art. 7), regarding the inhabitants of Mentone and Roccabruna. The persons, natives of the ceded territories or actually living in them (*i.e.*, probably domiciled), become French provided they do not opt and leave the territories within a year. The Treaty of 3rd October 1866 (Art. 14) between Austria and Italy follows the same lines. Persons, either inhabitants or natives of the ceded territories, can remain Austrians by option, one year being given in the case of inhabitants or natives who are actually resident in the ceded territories and two for natives who are abroad. The terms of Art. 12 of the Treaty of Zürich are somewhat similar, but it is not clear whether it does not merely refer to persons domiciled ("subjects domiciled on the territories ceded"), whether there at the time, in which case one year is allowed, or not there, in which case two years are given, excluding natives not domiciled. None of the treaties are well or clearly drafted, and questions as to minors and wives are left to be decided by chance.

It may be doubted, however, whether the principle of domicile is strictly sound. It may be argued that the practice of English Governments in treaty-making has been to regard the cession as carrying the allegiance of all persons in the ceded territory at the time, whether born there or not, domiciled there or not, unless specially provided otherwise, and therefore to have secured them the right of option. The Treaty of 1783 appears to have recognised (*cf.* Forsyth, *Cases and Opinions*, pp. 266–286) that all persons in the United States of America in 1783 were American unless they chose to remain English subjects, the date being fixed at that of the treaty of peace. The United States of America held that the proper date was that of the Declaration of Independence. Any person born before that date who left the country before the Declaration, and did not return, became alien, that is, they negatived the doctrine of origin (*see Inglis' Trustees*, 3 Peters, 120 *seq.*, Wharton, ii., 424–430). Similarly, in the Bloemfontein Convention of 1854, all English subjects were to be permitted to emigrate within three years, transferring their properties; and so in the Sand River Convention of 1852, all British subjects could do likewise, also selling their properties. These conditions must show that, normally, all persons lost their nationality by cession who were in the territories, and no others. So in the case of the cessions of the Transvaal in 1881 and

1884, the whole of the persons residing therein seem to have been recognised as losing their nationality. In this connection, it is important to note the law of the constitution of the Transvaal as to burghership. Under Law No. 3 of 1894, to be a burgher one must have settled in the Republic before 27th May, 1876, or have been born in it or have been an enfranchised burgher of territories amalgamated with the South African Republic by treaty or cession or annexation. The Constitution of the Orange River Colony (Chapter I., Part 1, para. 1) provides that all whitepersons born before or after the 23rd February, 1854, of persons residing within the Orange Free State, shall be citizens, and all persons who became burghers under the constitution of 1854. This means that every one who did not exercise his option of quitting the Orange Free State in 1854 became a burgher and his children became burghers.

In the case of Alaska the United States apparently recognised a similar rule. By Art. 3 of the Treaty of 1867 it was laid down that the inhabitants of Alaska at that date who did not return to Russia within three years thereafter became citizens of the United States, except members of the uncivilised tribes. The latter qualification is explained by the fact that the United States do not grant citizenship as a matter of course to all persons. A similar qualification as to natives occurs in the treaty with Spain regarding Cuba, Puerto Rico, and the Philippines of 10th December, 1898. In its older treaties—that for the acquisition of Louisiana and of Florida—it was stipulated for the population to become citizens, but clearly this did not include Frenchmen or Spaniards, natives of the colonies not actually resident there, and so it agrees with our theory (*cf.* Wharton, ii., 425, 426): when Texas in 1845, an independent Republic, entered the Union, the inhabitants were given by law the position of American citizens.

In the case of the Treaties of 1814 and 1815 receding to the Allies portions of territory acquired by France, it was stipulated that the persons who desired to remain in France, might become Frenchmen by declaring their intention within a given time. This was criticised as harsh by French publicists because it assumed that cession actually changed nationality *ipso facto*; still, it was undoubtedly good law (*cf.* Halleck, ii., 490; Calvo, para. 2472).

The treaty for the cession of Heligoland of 1st July, 1890, provides (Art. 12 (2)): "The German Government will allow all persons native of the territories thus ceded the right of opting for British nationality by means of a declaration to be made by themselves, and in the case of children under age by their parents or guardians, which must be sent in before 1st January, 1892." The treaty of 8th April, 1904, with France provides (Art. 7): "Persons born in the territories ceded to France by Arts. 5 and 6 of the present convention may retain British nationality by means of an individual declaration to that effect to be made before the proper authority by themselves, or, in the case of children under age, by their parents or guardians. The term allowed is one year from the day on which French authority is established over the territory concerned." The two cases are, however, in some respects inevitably exceptional, inasmuch as neither in Heligoland or the Iles de Los or Yarbutenda, the territories ceded, were there any resident British subjects who had not been born there; and, again, there were very few subjects born there yet at the time of cession resident elsewhere. Still, there were some Heligolanders, and it has always been held that they had to opt or lose their nationality, and Hall (p. 573) seems to regard this as reasonable. I doubt if it is really so. In the recent case of the cession of Puerto Rico and the Philippines and the relinquishment of Cuba, the Treaty of 10th December, 1898, permitted all Spanish subjects to retain their nationality by option, so that the American Government evidently held that in default of option all Spanish subjects in Cuba and the other islands on the date of the taking effect of the treaty must become Americans or Cubans. One year from the date of ratification was the time allowed for such option. But, clearly, a Spaniard who was not in Cuba, etc.,

on the date of the taking effect would not be an American or Cuban at all. The Russo-Japanese Treaty (Art. 10) follows the same model by permitting Russians to opt on condition of leaving Japanese territory.

As we have seen above, practically all modern treaties permit those whose nationality is, or would be, *ipso facto*, changed to opt for their old nationality. If they do so opt they will be regarded as never having lost their nationality at all. The treaty with France of 8th April, 1904, expressly provides for the retention of nationality, and it follows from the wording of the treaty between the United States of America and Spain of 10th December, 1898, that the same result occurs there, and it is accepted as a rule by Westlake (i., 73) and others. If the cession alters nationality *ipso jure*, it may be argued that they lose nationality and only recover it by option, but it is probably more accurate to take it that the grant of an option is a creation of an intermediate status for the term the option remains open. The view of Westlake (*l. c.*) is that provisionally the new nationality should be taken on the ground that, as more accept than opt, it is more likely that the new nationality will be the one ultimately accepted. This view seems unnecessary and somewhat illogical, and the fact that the person entitled to opt will have no nationality for a year or two seems unimportant, as the number of persons without nationality already existing is very large.

In cases of option it has hitherto been usual to require that the person opting should opt within a certain period, and, if he opts for his old nationality, should leave the ceded territory and sell his landed property within the period assigned by the treaty. The period granted has varied from six years (in the Treaties of Vienna of 1809, of Paris in 1814, and of Vienna in 1864) and three years (in the Treaty of Frederickshaven, 1809) to one year (in the Treaties of Trent in 1859, of Turin in 1860, of 2nd February, 1861, and of Vienna in 1866). The Franco-German Treaty of the 10th May, 1871, gave up to 1st October, 1872, extended to 1st October, 1873, for persons residing out of Europe (Art. 1 of Treaty of 11th December, 1871), and though requiring emigration permitted retention of landed property. This concession was also made in the Treaties of 10th November, 1859, of 24th March, 1860, regarding Nice, of 2nd February, 1861, regarding Mentone, and of 3rd October, 1866. The Convention of Bloemfontein in 1854 gave three years, that of the Sand River prescribed no time; both required emigration and sale of property. But neither the Anglo-German treaty of July, 1890, nor the Anglo-French Treaty of 8th April, 1904, requires either emigration or the sale of property, and these excellent precedents are confirmed by the Spanish-United States Treaty of 10th December, 1898, which gives one year from the ratification for the term of opting, and which requires neither emigration nor sale of property. There is an exact precedent for the latter treaty, also, in the Treaty between the United States and Mexico of Guadalope Hidalgo, of 2nd February, 1848, for the cession of California (Art. 8, *American State Papers*, XXXVII., 567). On the other hand, as late as 1878, 1879 the Treaties of San Stefano and Constantinople required that the inhabitants of the part of Bessarabia ceded to Russia should migrate and sell their landed property, but this was no doubt due to the very peculiar nature of the territory in question at the mouth of the Danube. This precedent has, however, been followed in the Russo-Japanese Treaty of 1905 (Art. 10), also for obvious military reasons, in the case of Russians desiring to retain their nationality.

(*b*) In the case of conquest on the theory of universal succession it would appear that the conqueror must have a right to the allegiance of all subjects of the conquered state, irrespective of the fact whether they were, or were not, at the time within the territories which he had conquered, and irrespective also of their wishes to become his subjects or not. On the theory of singular succession it would appear that (i.) the conqueror has a right to the allegiance of all those who are on the territory at the time of the announcement of the conquest and

annexation; (ii.) that persons not on the territory cannot be claimed to be his subjects; (iii.) that if they return to the territory they would be regarded as voluntarily taking up the position of subjects; (iv.) that it would be within the discretion of the conqueror to accept as subjects persons who, having been subjects of the preceding state, without now residing in it or returning to it, might apply for his protection. It could not be obligatory on him to accept this allegiance, but clearly he could do it if he wished.

The evidence from practice is not altogether convincing or complete. One proposition is generally accepted which is common to both theories, viz., that the conqueror becomes entitled to the allegiance of all persons actually on the conquered territory at the time of conquest. For England this is definitely laid down by Lord Mansfield in *Hall* v. *Campbell* (1 Cowper, 208), and for the United States of America in the judgment in *United States* v. *de Repentigny* (5 Wallace, 260), where it is decided that it is a rule of public law that the conqueror who has obtained permanent possession of the enemy's country has the right to forbid the departure of his new subjects or citizens from it, and to exercise his sovereign authority over them (*cf. also* Dana on Wheaton, note No. 169, and Wharton, para. 187; and for French practice Foelix, *Droit int. privé*, para. 35).

The point whether a person not actually in the territories at annexation is to be considered as *ipso facto* becoming a subject is not clearly decided. In the case of Count von Platen Hallemund (Pitt-Cobbett, *Leading Cases*, pp. 230–232), it was held by the Court of Prussia that the Prime Minister of Hanover, who had, after the capitulation of the Hanoverian army in 1866, exiled himself with the King of Hanover, had become a Prussian subject, and so was liable to be prosecuted for high treason. Professors Zachariae and Neumann, however, protested against this view, and held that there must be an express or a tacit submission as well as mere conquest, although staying in the country and performing the duties of a subject would be such a submission. In the case of the Elector of Hesse-Cassel (Pitt-Cobbett, pp. 227 *seq.*), he was regarded by the conquest of his dominions as being a subject of the empire, and his property was confiscated as he took up arms against his rightful sovereign by adhering to the armies of Prussia. This confiscation was universally held good as far as the ground alleged, viz., conquest, could be proved true (Hall, p. 572, n. 2). Both these cases seem, however, to be cases in which the person concerned was in the territories on occupation or annexation (*i.e.*, Count von Platen Hallemund was in Hanover at the capitulation and the Elector in his territories), so that there is no authority for extending, of necessity, nationality to a person not within the territories, who neither voluntarily applies for nationality nor returns to them to live in. This suits the theory of singular succession, and, so far as I can ascertain, coincides with the doctrine adopted by the British Government in 1886 when annexing Upper Burma, and 1900 when annexing the Transvaal and the Orange Free State. All persons in the territories on the date of annexation became, *ipso facto*, British subjects, but British nationality was not forced on persons not within the territories unless they returned to live in the Transvaal or the Orange River Colony. Persons, however, desiring to become British subjects could do so on application, but they must apply; it was not forced upon them. This doctrine appears eminently fair and reasonable, and is held by Westlake (i., 70).

Most authorities do not go into this point, but content themselves with general statements as to the change of nationality (*e.g.*, Hall, p. 571: "The conquering state is invested with sovereignty over all subjects of a wholly conquered state"). There is, however, a tendency in other cases to go further than is done here, and to lay down that all persons on cession or on conquest have a right to expatriate themselves, and to keep their old allegiance. Halleck (ii., 486, 487) and Calvo (para. 2467), following Burlamaque and Chief Justice Marshall, lay this down as a general rule. Rivier (ii., 438, 439) admits that International Law is not yet fixed

on this point, but argues for Halleck's view on the ground of the frequent, or, indeed, almost universal use of the option clause in treaties of cession, and of the general liberty of emigration allowed nowadays. Westlake (i., 70, 71), who, as mentioned above, denies compulsion in the case of the subject resident abroad, holds that nationality does not pass in the case of persons who leave the country without undue delay, and repudiate any tie to the conqueror, not returning save for a merely temporary purpose. His ground is that allegiance is a purely personal tie, and cannot therefore be claimed by the successor merely because it belonged to the predecessor. This ground is hardly adequate in the case of persons who are on the soil at the date of annexation; their presence there brings them into a personal allegiance to the conqueror, and he can by force, if he will, retain his new subjects. The practice of nations also seems against any such claim; the United States and English cases cited above do not admit of it, and the confiscation of the Elector of Hesse-Cassel's goods, and the case of Count Platen Hallemund, are French and German instances respectively to the contrary. Compare, too, the fact that according to Cogordan (*La Nationalité*, p. 333), the French Government, after 1815, would not accept as nationals persons who were permitted by the treaties of 1815 to emigrate from the restored countries into France. As Hall (p. 573, n.) points out, this could not have happened if the persons concerned had a right, irrespective of treaty, to keep their allegiance. The case of the young men of Frankfurt, who, after its conquest by Prussia, became naturalised in Switzerland, to avoid liability to military service, and whom Germany, in 1869, expelled from the city without compelling them to perform their military service, is no proof of the doctrine, and is not incompatible with the case of Count Platen Hallemund. German law permits a citizen to remain a citizen while being naturalised in another country, and therefore allowing these young men to be naturalised in Switzerland did not in any way show that they were regarded as being in a different position from any other German citizens. Germany could undoubtedly have compelled them to perform their military service, and it was only as a matter of courtesy to Switzerland, under whose laws they had been duly naturalised, that they contented themselves by merely expelling them from German territory (*cf.* Hall, p. 241).

The view has, however, found support in the Supreme Court of the Transvaal. In the case of *Wessels* v. *Olivier* (1903, O.R.C. Reports, 49), the point arose whether a man had become a British subject by the annexation of the Orange Free State. In the case of *Lemkuhl* v. *Kock* (*ibid.*, p. 77) it had been held that a Boer, who, after annexation, had taken the oath of allegiance and elected to remain in the country, had become a British subject. In this case, however, the only evidence that Wessels was British was the fact that he surrendered and had been sent to Basutoland. Sir J. Rose-Innes, C.J., said: "That is not sufficient to prove that he was a British subject. Mere annexation of the country would not make him one. He might choose to leave and go and live somewhere else. The fact of annexation does not make the people living in the annexed country subjects of the annexing state unless they, within a reasonable time, show by their conduct or their acts that they acquiesce in their position, and choose to become subjects of the conquering power. It is true Wessels was sent to Basutoland, but we do not know why he was sent there, and the mere fact of surrender is not sufficient." No authority is cited for this doctrine, but it was evidently held also by the High Court of the Orange River Colony itself; in the case of *Rabie* v. *Jansen* (*ibid.*, p. 72), decided in 1902, it was held that a burgher, who took in 1902 an oath of neutrality, did not thereby become an enemy of the Boers in the field. This must mean that he did not become a British subject, since *Lemkuhl* v. *Kock* (*ubi supra*) proves that a British subject was, *ipso facto*, an enemy (*cf. also Duplessis* v. *Bosman*, *ibid.*, p. 28). A similar view was suggested by the Chief Justice of the Cape of Good Hope in *The Queen* v. *Jizwa* (4 *Cape Times* Reports, 383).

The doctrine is certainly one which it would be desirable to establish, but there can be little doubt but that the Privy Council would have reversed the doctrine of the Chief Justice. Unfortunately, however, the value of the goods in dispute in all the cases was far below the two thousand pounds which is the lower limit for appeals without special leave from the Supreme Court of the Transvaal to the Privy Council, and the decision of the cases, in any event, would probably have rested on other grounds. As the law stands, it must be held that, despite these cases, allegiance to the conqueror falls inevitably on all subjects of the conquered country, situated at the moment of conquest in its territories, though he may permit liberty of emigration as an act of grace.

The rules regarding naturalized persons are presumably the same as those regarding natural-born persons, wherever that is possible. According, however, to the American Courts, naturalized citizens who owe an allegiance purely statutory, when released therefrom are remitted to their original status (*Tobin* v. *Walkinshaw*, cited in Wharton, ii., 431). There does not, however, seem to be any good authority for this view, and in practice it appears always to have been held that naturalised subjects become subjects of the conqueror whenever natural-born subjects do so. For example, all naturalised persons in the Transvaal or Orange River Colony who would, if natural born, have become British subjects, have been held by the annexation of the territory to have become British subjects. It must be admitted, however, that this rule subjects naturalised persons to some disadvantage, in that they are deprived of the privilege of option, when this privilege is expressed as being granted only to persons born in the ceded territory. But as a rule, it may fairly be argued that the naturalised person is mainly attached to the territory, and not to the exact form of state—this was certainly true of persons naturalised in the Transvaal and Orange River Colony—and that he really does not suffer much hardship in being converted into a citizen of the annexing or cessionary state.

Halleck (ii., 489) states that naturalised citizens and domiciled aliens can remain aliens to the conqueror, just like full citizens, by leaving the country. The test of transfer of citizenship is, in his view, domicile (p. 488). Calvo (para 2470) simply says that naturalised persons and strangers can, by change of domicile, subtract themselves from the sovereignty of the conqueror. It is not clear what is meant by these views so far as they concern aliens. If it is meant that under International Law a conquering state can impose its nationality on aliens in the conquered territory, it does not seem that there is any good ground for this view. An alien cannot be forced to become a citizen on any principle of International Law, and the change in the ownership of the territory leaves him still an alien, owing merely a local allegiance while within the territory of the conqueror. With regard to naturalised persons, their claim to be permitted to emigrate is nearly as strong as in the case of a natural-born person, but there is not sufficient usage to justify us in claiming the right of emigration as a positive principle of International Law, though international morality may point to its adoption.

It must be remembered, of course, that the citizenship obtained on conquest or cession need not include all the ordinary rights of citizenship, as understood in the most favoured provinces of the conqueror. The rights obtained are those of citizens of a ceded or conquered province, and as such are determined, not by International Law, but solely by the public law of the countries concerned. Thus under the United States Constitution the Indians and Chinese in New Mexico and California never became citizens (*see* Halleck, ii., 492; Calvo, para. 2477). Similarly in English law, the citizen has only the rights of a citizen of a conquered country, and is entirely dependent for political rights on the will of the Crown or of Parliament (Halleck, ii., 491; Calvo, para. 2476). Germany, likewise, did not grant to Alsace-Lorraine the ordinary privileges of German subjects.

CHAPTER VII.

STATE SUCCESSION IN RELATION TO THE PROPERTY OF THE STATE.

On any theory of state succession it is admitted that the state acquires the property of its predecessor, but opinions vary as to the exact extent to which this takes place. In considering the matter, Huber's division may be conveniently followed and the succession be treated according as it is to:—

(*a*) The public domain.
(*b*) The state archives.
(*c*) The private domain, which three may be classed as real rights; or to
(*d*) Obligatory rights of a public nature, and
(*e*) Obligatory rights of a private nature.

(*a*) On any theory, on cession or conquest, the succession to the public domain is complete. Such things as harbours, roads, fortifications, schools, prisons, public buildings, if the property of the old state, pass to the cessionary and are taken possession of by the conqueror. In the Treaty of 30th April, 1803, Art. 2, for the cession of Louisiana by France, are included *inter alia* "all public lots and squares, vacant lands and all public buildings, fortifications, barracks and other edifices." Similar provisions occur in the treaty with Russia for the cession of Alaska of 30th May, 1867, Art. 2, while the treaty of 10th December, 1898, with Spain, for the evacuation of Cuba and the cession of the Philippines and Puerto Rico, includes (Art. 8) "wharves, barracks, forts, structures, public highways and other immovable property of the public domain." Provision is made in the treaty of 23rd August, 1860, for the cession of Savoy and Nice, that materials, furniture and movable effects of all kinds in connection with the immovables dedicated to the public service in Savoy and Nice, and belonging to the Sardinian Government, should become the property of the French Government by the fact of annexation. Public property generally is specified in the Russo-Japanese Treaty of 1905 (Arts. 5 and 9). These clauses are taken for granted in most treaties, and have been seldom inserted in conventions made by Great Britain. They do not appear in any of the South African treaties, nor in the Heligoland treaty of 1st July, 1890, nor in the Anglo-French treaty of 8th April, 1904. In cases of conquest the taking over of all the public domain is a matter of course. It was done by Great Britain in the recent cases of the annexation of the Transvaal in 1877, of Upper Burma in 1886, and of the Transvaal and Orange Free State in 1900. The jurists all agree in laying it down as a rule, and to the long list given by Calvo (iv., 401, n.), may be added Selosse (p. 175), Huber (pp. 67, 68, 138, 155), and Fiore (i.,·229). It will suffice to note two apparent exceptions to the rule: (i.) a state does not appropriate as public property what under the old state was private property, but what under the law of the new state cannot be held in private ownership. If it does appropriate such property, it does so as an act of sovereignty, just like any other state appropriation of property, and, normally, would compensate the owner. At any rate, the mere change of state is not an act of confiscation of such property (*see* further Chapter IX.). (ii.) The mere change of state—*e.g.*, from a monarchy to a republic—does not turn into private property the property of the sovereign of the old state, which was his in his public capacity. Such property passes to the new state, and cannot be claimed as private property by the dispossessed monarch. On the other hand, his private property is respected.

(*b*) The question of succession to state archives has received much attention from continental jurists. In the case of cession, Huber (pp. 68 *seq.*) lays down the rules as follows: Archives relating to a territory which passes wholly to a cessionary go with it. If a province is divided, the state which retains the capital keeps the originals of the archives, unless, indeed, they concern exclusively the other part of the province. Sometimes common property in the archives is established; in any case copies are to be furnished on demand, the cost falling either on the owner of the archives, or on those asking for copies, or on both. Papers relative to taxation, etc., go to those to whom the taxes belong, and the records of the services of officers to the power whose subjects the officers remain.

All the great continental treaties contain elaborate conditions of this kind—*e.g.*, the Treaties of 10th November, 1859, regarding Lombardy; of 30th October, 1864, regarding the cession of Schleswig-Holstein; of 3rd October, 1866, regarding Venetia; and of 10th May, 1871, regarding Alsace-Lorraine. The United States, similarly, has stipulated regarding archives in the Treaties of 30th April, 1803, for the cession of Louisiana; of 17th July, 1821, for the cession of Florida; of 30th March, 1867, for the cession of Alaska; and of 10th December, 1898, regarding Cuba and the Philippines. In all these cases the stipulations have been for leaving *in situ* all archives, copies to be provided to the Government concerned, or to individuals on application. England has been singularly indifferent to such considerations. None of the South African Conventions, nor the Heligoland Treaty of 1st July, 1890, nor the Anglo-French Treaty of 8th April, 1904, mention archives. The point is of some theoretic interest, since, if the succession is universal, the successor has a title to all the archives concerning the ceded territory. On the theory of singular succession he is only entitled to such archives as are found *in situ*. In the case of Heligoland in 1890, and of the less important Iles de Los and part of the Gambia in 1904, it left the records *in situ* to be taken possession of by German and French respectively, while retaining all the records in England or in that part of the Gambia which was kept. It cannot be argued that this was done because of any special interest felt by England in the archives, or because they would have been of no interest to the cessionary. The old records of Heligoland would have been of great interest to Germany, but in the absence of any express stipulation in the treaty His Majesty's Government were entitled to keep the records, and did so.

In the case of conquest the conqueror on any theory succeeds to the records found in the conquered territory. On the theory of universal succession he would be entitled to claim to succeed to any documents removed from the territories by agents of the conquered power. On the theory here maintained he would have no right to any documents not *in situ*. The question arises again under head (*c*), but I have been unable to find any evidence of such a suit having been brought in any English or foreign court. On the other hand, in favour of the theory here maintained, may be quoted the fact that in 1905 His Majesty's Government did not take proceedings in the Dutch courts to enforce a claim made by the Colonial Government of the Transvaal to certain documents belonging to the late Government of the Transvaal, and known to be in the hands of an ex-civil servant.

(*c*) The private domain of the state consists of such things as the state treasure, the state domain, railways, stores of arms, etc. In the case of conquest it is clear that all those pass over to the conqueror as his own, subject only to such rights as private individuals may have over them.* For example, if a conqueror takes over the state treasure of his predecessor, he takes over so much only as may not have been lawfully expended. So when the balances at the National Bank of the Transvaal were taken over by the British Government there was

* *Cf.* Moore, *Act of State in English Law*, pp. 157, 178.

deducted from the total the amount of cheques drawn against the balances by the Republican Government, and paid by the bank before the taking over took place. Similarly, all the monies in the hands of agents were taken over subject to the deduction of disbursements duly made by them. The correct mode of regarding these cases is not to regard the Government as succeeding to a mass of rights and liabilities. What has been duly expended has actually—notionally, if not in fact—diminished the total assets, and the conqueror succeeds to the nett amount. Otherwise, the conqueror would be bound to pay sums advanced by the agents under due authority but in excess of the imprest made to him, a contention which, we shall find, cannot be supported.

A difficult question arises when it is asked whether the successor can claim sums of money or other property not actually in the conquered territories. Or, to put it concretely, can the British Government sue successfully in a foreign court as conquerer of the Transvaal and successors to the state property for sums of money taken from the country by agents of the late Government? On Huber's view we are bound to hold that it can do so—a remarkable result. At first sight, however, it appears to be supported by a series of English cases of which the most important* are *United States* v. *McRae* (L.R. 8 Equity, 69), *United States* v. *Prioleau* (35 L.J. Ch. N.S. 7), *Republic of Peru* v. *Dreyfus* (38 Ch. D. 348), and *Republic of Peru* v. *Peruvian Guano Co.* (36 Ch. D. 489). It is not necessary to go into the details of these cases, the result of which, as far as it concerns the present point, was to decide that, when an established Government seeks to recover possession of the property of, or to enforce a contract entered into by, an insurgent Government, it must fulfil the contract as a whole and must take the property subject to any set-off which can be pleaded by the agent who has it in his charge. The United States would not accept the doctrine as laid down by James, V.-C., and declined in the McRae case to an account being taken on that basis, and it cannot be said, therefore, that the doctrine has yet established itself at International Law. But both parties recognised the right of the United States to the property. The analogy, however, does not fairly apply to a state succession, which, on the theory here set forth, differs essentially from any change of Government, in that, by International Law, state succession means an alteration of the personality of the conquered state while change of Government does not. No conclusion, therefore, as to state succession can be drawn from these cases, since even the Confederate States of America were never recognised by Great Britain as more than belligerents.

In actual practice, where real state succession occurs, in 1798 the newly formed Helvetian Republic claimed in English courts funds of Berne and Zürich which were lying in the charge of the Bank of England (*Dolder* v. *Huntingfield*, 11 Vesey Junior, 283). But after being argued on technicalities of procedure the case appears to have been dropped, and the funds were not handed over to the Helvetian Republic but were restored in 1815 to the Cantons, the interest from 1798 to 1814 being surrendered by the Cantons to pay off part of the Helvetian National Debt. It seems clear that there was no legal obligation on the Bank of England to recognise the title of the successors. Further, the British Government has not taken any steps to recover in foreign courts any of the sums believed to have been taken from the Transvaal by agents of the late Government, nor has it sued in the courts of Mozambique for property of the Netherland South African Railway Company situated at Delagoa Bay.

The principle is fully recognised by Phillimore (iii., 825): "So if the active debt of the state be not locally within the imperium of the conquering ruler, he does not acquire a title by which he can dispose of it" (*ibid.*, p. 827). "The general rule, however, remains that neither movable nor immovable, corporeal

* *See also King of the Two Sicilies* v. *P. & O. Company and Willcox* (19 L.J. N.S. 202), and *cf. Emperor of Austria* v. *Day and Kossuth* (3 De G.F. & J. 217).

nor incorporeal, property situate within or to be extracted from a neutral or an unconquered land can be considered as among the acquisitions of the conqueror." He points out (p. 826) that if an actual seizure of enemy's funds did take place in a neutral territory it would transfer the property, but, of course, the neutral could resent it. The same principle is asserted by Lord Loughborough in *Barclay* v. *Russell* (3 Vesey Junior, 423) in the case of the claim of Maryland to stock in England.

Accepting, then, the doctrine that there is no legal passing over of the property not within the state limits, it must remain open for the Government and Courts of the power within whose territory the property is locally situate to decide what shall become of it. It can either regard the agents as holding the money legitimately for the purposes of the ex-Government, and permit them to apply it for securing the livelihood of those whose places and employments have been lost through the change of state. There is nothing immoral in permitting such an employment of the funds. On the other hand, there may be cases where, with propriety, the sums may be restored to the representatives of the new state, but the matter is one to be decided mainly on consideration of ethics and morality, or, if it comes before the Courts, on the general principles by which the jurisprudence of the country determines the disposal of monies held by agents in trust for purposes which can no longer be carried out in their entirety.

In the case of cession it is thought by Selosse (p. 180) and others that at least, in some instances, the private domain remains the property of the ceding state. This seems impossible in the case of an ordinary state. The theory of singular succession here maintained is against it, and Huber (p. 70), on the theory of universal succession, condemns it. The political inconvenience of having a foreign Government the owner of railways, etc., is sufficient to show its impossibility. The evidence of treaties, so far as it goes, is against the view of Selosse. The passing over of all the private domain is recognised in Art. 4 of the Treaty of the 28th November, 1844, between Austria, Sardinia, Tuscany, Modena and Lucca; in the Treaty of 28th August, 1819, Art. 5, between Prussia and Saxony; in the Treaty of the 23rd August, 1860, Art. 4, between France and Sardinia; while the exceptions to the rule are only to be found in such cases as (i.) the breaking up of a condominium such as that of the state of Lippe of 17th May, 1850, where the matter at issue was of no real consequence; or (ii.) the giving back to the ceding power of the weapons of its soldiers, as in the Franco-Sardinian Treaty of the 23rd August, 1860, and in the Treaty between Spain and the United States of 10th December, 1898.

Property outside the ceded state does not pass with the cession, though it was obtained with the ceded territory. This is laid down in a protocol to the Treaty for the cession of Venetia of 8th October, 1866 (Huber, p. 213), where it is provided that the property of the Austrian Palaces at Rome and Constantinople, which belonged formerly to the Venetian Republic, remains vested in the Government of Austria, despite the cession. There is a somewhat analogous case in connection with the Eastern Railway Company of France. By an additional article to the Treaty of 10th May, 1871, the French Government was bound to use its right of re-purchasing the concession granted to that Company, and the German Government was to be subrogated to its rights in all that concerned the railways on the ceded territories, whether still under construction or actually built; but with regard to the rights and properties of the Company situated in Swiss territory from the frontier to Basle, the German Government only offered to purchase these rights if the French Government would agree. Thus, it was not held that the Government could succeed without special arrangement to rights outside the ceded territory, however closely connected with it. This clearly supports the view that in the case of conquest property in things outside the state does not legally pass to the conqueror, and it remains either for the Government of the state in which the

property is situated, in accordance with the principles of morality and expediency, or for its Courts on the maxims of private law, to decide as to the disposition of such property.

Property owned by corporations, of course, does not fall under the rules of succession. A corporation is a private body, and if a cession is made it retains any property which it had in the ceded part as its private property, subject to the ordinary rules affecting such property; its corporate powers, of course, cannot extend beyond the political boundary of the state under whose laws it was incorporated. If through cession a substantial portion of the territory over which its power extends is removed, a liquidation of assets is frequently agreed upon by treaty (Huber, pp. 73, 214). The subject, however, possesses no theoretical interest, and will not here be further pursued.

(*d*) The public obligatory rights or rights *in personam* to which succession is said to take place are chiefly claims for unpaid taxes and similar imposts. The best way to regard this matter, it appears, is not to consider the cessionary or the conqueror as succeeding to the rights of the ceding state or the conquered, but to take it that a new state comes into existence, which by virtue of its sovereignty imposes taxation, in doing which it can either follow the rules laid down by its predecessor or adopt rules of its own. The practical result is, of course, the same on any theory. Selosse (p. 197), who holds the view of succession, considers that, logically, taxes due but not collected should in the case of cession be divided according to the date of cession, and that for the financial year in which the cession takes place no alteration should be made in the taxation. The theory, which is certainly to some extent logical, is contrary to fact. Even in a case of cession the successor cannot be expected to leave the taxation unchanged until the next financial year or share the proceeds with his predecessor. The Treaties of Prussia with Saxony of 28th August, 1819, and with Hanover of 23rd March, 1830, and the protocol of the Frankfurt Conference of 26th September, 1871, are all against the view of Selosse, and it is worth noting that he himself (p. 197) admits that taxes inconsistent with the successor's economy do not persist—*e.g.*, that France could not on conquest or cession take over vassal services when her own economic system had given up such services. The succession is subject to the successor's public law, and taxation can only exist in so far as it is consistent with the public law.

In the case of the annexation of the Transvaal in 1900, a proclamation, No. 13 of 1900, was issued before the annexation took place by Lord Roberts, calling on all persons in those parts of the Republic in the possession of the British forces to pay all taxes, revenues, dues, licenses, royalties, monies, etc., usually paid to the Government of the South African Republic, to Her Majesty's forces. No alteration was made in the situation after the annexation of 1st September, 1900, and taxes were collected as under the Republic. The taxes, however, are collected by a new act of sovereignty, and not because of any continuance of the sovereignty of the predecessor. It is not, accordingly, customary for a succeeding Government to enforce payment of arrears of taxation beyond the year in which the annexation takes place.

(*e*) From public rights *in personam* Huber (p. 75) distinguishes private rights, such as rights to rents of state domains, loans to public bodies, etc., which he holds remain to the ceding power despite the cession. In the case of conquest the distinction cannot be held good, save in so far as a third party might choose to regard effects situated within his jurisdiction as still belonging to the representative of the conquered state. But it seems very doubtful whether Huber's doctrine can be upheld as a rule of law. He bases it on the ground that these rights have nothing to do with territorial sovereignty, and are, therefore, not affected by change of state. He points out that in military occupations the conqueror seizes stands of arms, treasure, etc., and collects outstanding taxes, and that consistently with this all these become his on the cession. But he is not entitled to collect—*e.g.*, repayments

of industrial loans, and so the completion of the succession by cession does not transfer these payments to him. The objection that this theory will not apply to peaceful cessions he meets by pointing out that it is not the military occupation that is decisive for the temporary and provisional succession, but simply the actual lordship of the conqueror which is completed by the treaty of cession. In a treaty of peaceful cession both these requisitions—actual lordship and treaty of cession—come together. This argument is neither very clear nor convincing, and it is not apparent why the conqueror should not have the right to receive repayment of loans, or why payment to him should not be a good discharge of the debt. Hall (p. 420) seems to recognise that even when in his view the occupier of territory cannot recover such debts the conqueror can. "It is only when the complete conquest has been made, and the identity of the conquered state has been lost in that of the victor, that the latter can stand in its place as a creditor and gather in the debts which are owing to it." This of course does not apply to taxes and duties which the occupier can always collect (*ibid.*, p. 279, n. 2). Hall's remarks apply in the case of the conquest of a portion of a territory followed by a treaty, and therefore directly contradict Huber.

Of course treaty stipulations may preserve certain rights to the ceding state, and the conquest or cession cannot relate back to the time before it was completed. Sums of money paid to the ceding state for lands within ceded territories cannot be demanded from the ceding state. Examples of treaty stipulations are not very numerous. By Art. 15 of the Franco-Sardinian Treaty of 1860, France undertook to account for the sums due by public bodies and corporations at Savoy and Nice to the Sardinian Government in respect of loans. A similar provision was made in the Treaty for the cession of Schleswig-Holstein in a protocol of 1st April, 1865, and at the Frankfurt Conference the French representative successfully maintained the right of his Government to be repaid advances made for industrial purposes under a law of 1st August, 1860, to persons in Alsace-Lorraine. The German representative, however, declined to allow any other debt to be considered as falling under this head. On similar principles Art. 2 of the Treaty of Zürich of 10th November, 1859, stipulated that payments of the sum due to the state by the concessionaires as an equivalent of the cost of the railways in the ceded territories were to be made to the Austrian Treasury, and not to Italy.

But the general rule seems to be that all these claims and funds pass over to the conqueror or cessionary. This follows from the fact of the passing over of the territory and of the private domain (*see* (*c*) above), which carries with it all contract rights relative thereto, unless especially exempted by treaty in the case of cession. The conqueror or the cessionary takes possession of every form of right which he can enforce, and in his own courts he has no difficulty in making good the rights which rest only on contract, since he can bring actions, just as he can bring actions to enforce the delivery of property which has passed to him through his seizing the country. On the other hand just as, as we have seen above, the property situated outside his jurisdiction does not pass to him through the cession or annexation, so it cannot be expected that there is a rule of law that he can enforce in foreign courts personal rights possessed by the state which he has conquered, or by the ceding state.

With regard to treaties, it may be noted that the Treaty of cession of Schleswig-Holstein of 30th October, 1864, expressly recognises that funds, such as funds for building prisons, for fire insurance, sinking funds, etc., pass over by cession to the cessionary. Spain has retained no claims for funds in Cuba, the Philippines, or Puerto Rico by the Treaty of 10th December, 1898, nor has England made any such reservation in any of the South African conventions or in the Anglo-German Treaty of the 1st July, 1890. The principle of the passing over of such rights was adopted in the settlement between the Government of Natal and the Transvaal over certain debts. The example is in point, for though the colonies are not states

of International Law, yet the case was deliberately argued and decided on the ground of International Law. The Transvaal handed over some territory to Natal, viz., the districts of Utrecht and Vryheid, in return for a payment of £700,000 (*Parliamentary Paper*, Cd. 941). It was found after the cession that there were debts due by farmers in the ceded territory secured by mortgages in favour of the Government of the South African Republic. It appeared that neither colony had taken the matter into consideration when the terms of cession were arrived at, and it was contended that Natal had no claim accordingly to the payments made. It was decided that the claim in International Law was sound, as with the territory went all rights not specially excepted and, therefore, the right to obtain repayment of the debts.

The question of the power of the conqueror to claim repayment of debts was raised in the case of the Elector of Hesse-Cassel. The question there was complicated with the question of the power of the mere occupier of conquered territory to recover debts due on contract or on bills, cheques, etc. The majority of writers are in favour of his power to do so, but on the other side are Heffter (para. 134); Phillimore (iii., 820), and Hall (p. 421). The Hague convention (Art. 53) on the whole favours the latter view, but it permits the seizure of bills payable on demand, or appears to do so. But that the conqueror who has consolidated his conquest can appropriate these debts, so far at least as they are due from his new subjects, is not denied by Heffter, Phillimore (p. 823), or Hall. The result is, indeed, self-evident; the conqueror seizes the property of the state, incorporeal property no less than corporeal. The question, however, is different when the property is a debt due by another state or by a debtor in another state. In the case of the Elector (*see* Phillimore, iii., 840 *seq.*) his own Court pronounced in 1818 that those subjects of the King of Westphalia who had paid to his exchequer and had received discharges could not be legally called upon to pay a second time. That this doctrine is correct appears to me not to be open to dispute.

With regard to debts due by persons or other states, the evidence for the theory of universal succession, which, it may be noted, appears to have taken its origin from the discussion of this question, is as follows: Quintilian (v., 10) refers to a case in which the Thessalians owed a hundred talents to Thebes. Alexander, on conquering Thebes, gave the Thessalians a release from this debt the Thebans, on being restored to their freedom, tried to claim the debt, and the question was disputed before the Amphictyonic Council. It has been usually held that the decision was in favour of the Thessalians, and Grotius (Book iii., Chapter VIII., sec. 4) quotes this instance in support of his theory that "*incorporalia jura quæ universitatis fuerant fient victoris quatenus velit.*" Albericus Gentilis distinctly says Alexander was a "*universalis successor*" in these circumstances. Vattel (Book iii., Chapter V., sec. 77) says that in case of conquest the conqueror acquires the debts due to the conquered state by third parties. On the other hand Hotman held that he was not a "*universalis et juris successor sicuti heres aut bonorum possessor, sed particularis et rerum singulorum quia victores earum demum rerum domini sunt juri belli quæ manu capi possunt.*" (*See* for this Phillimore, iii., 832–835.)

Of course the legal value of Alexander's precedent is hardly a subject for serious discussion, more especially as no one really knows what the result of the dispute was. But if the decision was in favour of the Thessalians, then, undoubtedly, it can best be accounted for on the theory of universal succession. The matter was much canvassed in Count Hahn's case. There the facts were that Count Hahn paid to Napoleon, who had conquered the territories of the Elector of Hesse-Cassel, the amount of a mortgage debt due to the Elector. Count Hahn's estates were situated in the Duchy of Mecklenburg, and the Court of Registration of the Duchy made difficulty about recognising the release of the mortgage debt, inasmuch as it had not been paid to the mortgagee. Eventually it registered the cancellation of the mortgage under an order issued by the Duke of Mecklenburg,

who acted at the request of Napoleon. When the Elector was restored, on the downfall of the Emperor, to his dominions, he endeavoured to insist on the heirs of Count Hahn paying over again the mortgage debt on the ground that the previous release was illegal. Three German Universities, the then Courts of Appeal, decided against the Elector, and it has usually been considered that this case establishes the doctrine that a state's successor succeeds to rights of action possessed by its predecessor against persons outside its own territories, since otherwise it could not have released the debt due to Count Hahn. It is doubtful, however, whether it is necessary to accept this conclusion. (i.) The conclusion can only be justified if it is assumed that Napoleon claimed possession of these debts as successor to the Elector of Hesse-Cassel in his public capacity as Elector. It will be seen shortly that, though the circumstances of the case are not clear, it is at least as probable that he did not claim as successor but merely in virtue of the confiscation of the private property of the Elector. If the latter be the case it need hardly be said that the theory of universal succession gains no support from the case. The Court, indeed, expressly held that it made no difference to their conclusion whether the property were public or private, and this is no doubt true, but it does make, of course, the greatest possible difference in the nature of the deductions to be drawn from the case. (ii.) The real ground of the decision is suggested by a passage in Phillimore, whose discussion of this case forms his most important and valuable contribution to the question of state succession. He says (iii., 826): "If, indeed, an active seizure of enemy's funds did take place in neutral territory it must be admitted that these funds would be actually acquired and might be alienated by the conqueror, because it is the *nudum factum* upon which the *occupatio bellica* is founded." Now the Courts of Mecklenburg, acting on instructions from the Duke, permitted Napoleon to obtain payment of the debt. It appeared clear that the Court felt grave doubts as to the legality of the precedure, and it only consented to recognise the release of the debt on direct executive instructions, which, of course, it could not disobey. Thus, having permitted Napoleon to receive payment of the debt, it could not possibly insist upon the debt being again paid, so that all that the case proves is that if a state permits a successor to obtain an asset of his predecessor it cannot afterwards repudiate its own action. The only evidence for the doctrine of universal succession is the action of the Duke in causing his Court to recognise the release of the mortgage by payment of the debt to Napoleon, and that act was based on political and not on legal motives.

Jurists, as a rule, do not clearly distinguish the cases of internal and of foreign debts, and it is impossible to judge how far they really hold the theory that foreign debts pass *ipso jure* to the conqueror. In 1860 it was held by the Master of the Rolls in the case of *Wadeer* v. *The East India Co.* (7 Jurist N.S. 350), that if a foreign power takes prisoner an enemy, and thereby takes possession of documents and thereon founds a claim to a debt due from others to that enemy as a private individual, he has no right to exact payment of that debt, but if the debts are due to him in his sovereign character then the debts can be recovered. But this decision, taken in conjunction with the facts of the case, merely applies to cases within the jurisdiction of the successor, and therefore carries us no further than the decision given in the Court of Hesse-Cassel against the Elector in favour of those debtors whose debts had been released through payment to the King of Westphalia.

The position with regard to rights *in personam* possessed by the predecessor against individuals outside his jurisdiction appears to me to be precisely on the same footing as his rights *in rem* with regard to property situated outside his jurisdiction. In neither case is there any rule of International Law under which he is entitled to enforce these rights in the Courts of a third party, or to insist on the Government of the third party securing them for him by executive or legislative action. The Government may, if it thinks fit on ethical or political grounds, take such action, and the Courts may hold that the title of the successor is a good one,

but as the examples cited under head (*c*), which so far as they apply to contract are here also relevant, show, if they are prepared to recognise the title of a successor they will only do so on such conditions as seem to them equitable, and these conditions would certainly differ from any theory of International Law. Nor, indeed, is it likely that any successor will be anxious to attempt to claim in a court of law such rights, for he would obviously expose himself to the humiliating position of having his title to be a successor scrutinised by perhaps an unfriendly power, which might well prefer to support the title of the previous sovereign (*cf.* dicta in 1903, Transvaal Supreme Court Reports, 400 *seq.*). The Transvaal Government, accordingly, while insisting on recovering in its own courts debts due on mortgages, etc., to the Government of the late South African Republic (1905, Transvaal Supreme Court Reports, 582), has apparently made no effort to recover sums of money due to the Republican Government by persons in other states.

The result of this investigation, therefore, is that the state succeeds to the property of its predecessor, whether domain public or private, or archives or claims founded on contract, in so far as that property is locally situated in the conquered or ceded territory, and so obtainable by action in its own courts, provided of course that special rules are not arranged by the terms of cession. In the case of taxes there is no succession, but a re-imposition by sovereign authority. If the property is situated outside its jurisdiction no legal rule of succession exists.

In the case of monarchical states the successor does not, of course, obtain the private property of the sovereign if the law of the state recognised a distinction between such private property and public property. This is probably a law of International Law. Of course the successor can ignore International Law and appropriate the property, but it does not become his by succession. The treaties recognising this principle are, therefore, probably declaratory. Such is the treaty between France and Monaco, of 2nd February, 1861, regarding the cession of Mentone and Roccabruna; that of 3rd October, 1866, regarding the cession of Venetia by Austria to Italy, Art. 22; that of the Great Powers with Turkey of 24th May, 1881, Art. 5; and that between Greece and Turkey of 2nd July, 1881, regarding Thessaly, Art. 5. So in the case of the separation of Belgium from Holland, the King of the latter state preserved his share in the Bank of Brussels (Huber, p. 266). Calvo (para. 2481) declares "the right of conquest, to judge from the Court of Cassation at Paris (Sirey, 17–1–217), affects only the property of princes which they possess in their quality of princes, and not the possessions which are their private property." The same view is held by Rivier (ii., 347) and Holtzendorff (ii., 38). A similar doctrine has been judicially held in England (*see* the case of *Wadeer* v. *The East India Co.* cited above).

On the other hand, the case of the Elector of Hesse may be cited as an instance of the confiscation of private property by the successor. It does not seem possible to determine with certainty the exact character of the property seized, because the legal title of the French Emperor was not made clear at the time. The statement made was (Phillimore, iii., 843) that, in consequence of the conquest of the Electorate of Hesse-Cassel, the Emperor had confiscated to the profit of his extraordinary domain the debts appertaining to the ex-Elector of Hesse and the state and provinces of which he had taken possession, and he declared that he had decided that no discharge was to be obtained save from the treasury of his extraordinary domain. Hall holds (pp. 567, 572) that the confiscation was made on the ground that the Elector was a subject in arms against his sovereign by conquest (*cf.* Phillimore, iii., 847). If this is the case of course there would be no exception to the rule respecting the inviolability of the private property of monarchs in the case of conquest. This view, indeed, appears to be the correct way of considering the case of Count Hahn, and with it disappears also the chief support of the argument for a succession to the debts due to the predecessor from persons beyond the jurisdiction.

CHAPTER VIII.

STATE SUCCESSION WITH REGARD TO CONTRACTUAL AND OTHER OBLIGATIONS.

THE rights *in rem* possessed by individuals against the state are, of course, possessed by them against all persons, and may more conveniently be considered in Chapter IX. This chapter will accordingly be confined to rights *in personam* possessed by individuals against the state. These rights may be divided into rights *ex contractu*, including rights *quasi-ex contractu*, and rights *ex delicto ;* and it will be convenient to consider separately among contractual right questions regarding (*a*) the public debt ; (*b*) concessions and ordinary administrative contracts ; (*c*) deposits, etc. ; (*d*) pay and pensions of officials.

I. The theory of universal succession has its chief importance in its application to these problems, and it is not to be denied that there is a most formidable array of juristic opinion in favour of the doctrine that a state succeeds to the obligations as well as to the rights *ex contractu* of its predecessor. Something must, no doubt, be deducted from the weight of that opinion, in view of the fact that as Hall (p. 93, n.) says : "The subject (of state succession) is one on which writers on International Law are generally unsatisfactory. They are incomplete, and they tend to copy one another." Again, it may be doubted exactly how far we can press the dicta of some of these writers. As has been seen above Grotius combines the doctrine of universal succession with a view that the conqueror has full power over the disposal of the gains of his conquest.

The evidence in support of the theory does not, it seems to me, really bear it out. Its main basis is the provisions of treaties of cession. Now (*a*) it is logically impossible to prove any rule of International Law from treaties. It is perfectly possible that a treaty may contain, just as ordinary contracts often contain, provisions which would legally exist without express stipulation. It may be that, when two countries stipulate that the cessionary shall bear a proportionate part of the public debt of the ceding state, they merely *ex majori cautela* put in express terms a rule of law ; but it is logically equally possible that the stipulation is intended to exclude a rule of law that a ceding state must bear all its own national debt, even although part of it appertains to the ceded territory, and then to argue from the treaty to a rule of law would be like endeavouring, as is frequently done in this country, to establish a trade custom by means of a number of individual contracts containing the rule alleged as a custom as an explicit stipulation. It may be argued that a consensus in a number of treaties points to such a strong feeling as to the proper rule as to justify us in calling the rule a law. But this brings us to the great question (*b*) how the weight of treaties is to be gauged. It is notorious that for every rule sought to be established by precedents of treaties it is possible to adduce precedents to the contrary. Treaties are frequently only intelligible in the light of history ; the treaties among the German states which were annexed to the Vienna Congress Treaty of 9th June, 1815, were in the nature of European settlements, and must be expected to differ from such treaties as that between Prussia and Austria in 1866 or France and Germany in 1871. The practice, too, of a great nation must overrule that of petty principalities. For instance, the Franco-German Treaty of 1871 transferred no part of the general debt of France to Germany, and thereby threw grave doubt on the rule which, as will be seen below, is supported by a great deal of evidence of other treaties. Again, the Treaty between Spain and the United States, which terminated the war of 1898, makes no provision for the United States taking over the local debt of

Cuba or the Philippines, and the American Commissioners expressly declined to admit the validity of arguments from previous treaties. But surely it is impossible to argue for the existence of laws when treaty practice is so divergent. Besides, what use is it to argue that the Franco-German Treaties of 1871 are in favour of the taking over of the local debts of ceded provinces when a huge indemnity is exacted? The indemnity was fixed with a full knowledge of the facts, and it is useless to deny that the fact of the taking over of the debts of Alsace-Lorraine was considered in fixing the amount.

I do not think that it is at all possible to evolve a consistent law from treaty practice in view of the remarkable variety of treaty stipulations, details of which will be given below. But even if a more or less coherent law of cession could be evolved, it would hardly help us to a law of annexation without treaty, and it is important to note that none of the writers have fully realised this side of the question. This is due partly to the fact that there are comparatively few cases of such annexation, and that the information regarding the British cases of recent years—viz., the annexation of the Transvaal in 1877, of Upper Burma in 1886, and of the Transvaal and Orange River Colonies in 1900, is buried in blue-books and difficult of access, while most of the leading text-books of International Law date before 1900. Now consideration of a case of annexation appears to render it impossible to accept universal succession as a rule of law. On the theory of universal succession no power could conquer and annex a bankrupt state, however troublesome that state might be, since the conqueror would have to bear its debts. The argument appears fatal to the theory, and, as will be seen below, the British Government, without enunciating any theory, has never admitted any legal obligation to take over the debts or contracts of a conquered territory. It has repudiated legal liability in every case and then has done what appeared equitable. This is practically to accept a theory that universal succession is not a rule of law. To make it a rule of law would be ruinous to any successor, but this does not prevent the exercise of tenderness towards the equitable claims of persons who *bonâ fide* have lent money or supplied goods to the conquered state.

That the recognition must be purely of a discretionary nature may be recognised in the case of claims for the repayment of money lent or for goods supplied for the prosecution of war against the conqueror. If universal succession is a rule of law it must be held that up to the date, at least, of the definitive conquest, the conqueror is bound to meet the debts of the conquered power. He must pay for the cannon sold to shell his troops, for the hire of troops employed against him, and repay the public debt contracted in order to store his enemy's arsenals. Huber indeed (pp. 114, 115) admits that it is not usual for a conqueror to pay the war requisitions of the conquered power, and cites (p. 249) the Treaty between Prussia and Westphalia of 28th April, 1811, as an example where the vanquished had to bear the burden. But Huber does not seem to see that a theory so opposed to practice as his own must be radically unsound.

Indeed, Huber seems to have quite a different conception of law from the English conception of a law, even in the sense of a law of International Law. By a law we mean something which is supported by practice or by juristic or conventional authority with so much unanimity that a deviation from it would be regarded with disapproval by general European opinion. Huber seems to consider it rather as a logical principle which evolved more or less *à priori* should fit in with facts but is superior to facts. Only thus can we understand when he writes (p. 123): "In this sphere (the question of the position of civil officials in a case of cession), as in the case of pensions, pay and caution-monies, there is in practice complete caprice," and yet seems not to realise that his theory needs revision. But on the theory of singular succession this fact is easy of explanation, for it is then held that there being no legal obligation, all these points must be decided on grounds of expediency alone, and expediency will naturally produce results which,

varying with all sorts of local circumstances, cannot be summed up in any simple law. The fact is that Huber's conception of law appears to be an illegitimate compound of ethics and law. Either a treatise on what is law, or what, in the opinion of the writer, ought to be law, is in itself legitimate and proper, but the conclusion between legal and ethical points of view so common in writers on International Law adds considerably to the difficulty of the topic.

The theory, therefore, that the state takes over no obligations as a matter of law appears to be supported by (i.) the logical absurdities into which the doctrine of universal succession, if carried out, leads, such as the impunity of a hopelessly bankrupt community and the obligation to pay for the war debt of an enemy; (ii.) the fact that treaties cannot yield any coherent system of law; (iii.) the practice of the British Government in regard to the recent annexations; (iv.) the fact that, taken in conjunction with motives of expediency, it affords an adequate explanation for the historical facts.

It remains to apply the theory to the various classes of contract above enumerated, and for this purpose it will be desirable to consider the topic (*a*) National Debts under the heads

I.—*Debts of the Central Government*

either (*a*) Debts contracted in the general interest; or
(*b*) Debts contracted for the purpose of the ceded province or secured by mortgage of its revenues or otherwise.

II.—*Local Debts, i.e., Debts of Municipalities.*

I. In the case of total annexation the difference between the two classes of general debt, as Hall (p. 99) has pointed out, disappears, local and general debt then being one, and such cases will be considered under sub-head (*b*).

(*a*) With regard to the general debt, there is, it is held by Huber (pp. 80 *seq.*) an obligation, evidenced by the prevailing practice, upon the cessionary to take over a part of the general debt of the power which cedes the territory, proportioned in some way to the value of the territory. It is not, indeed, contended by Huber—it is obviously impossible to do so—that the debt *ipso jure* passes to the cessionary, so that the creditor of the ceding state can bring an action against him in his courts, but the ceding power has a right to call on the cessionary to take over a part of the debt. Selosse (pp. 168, 169) adds other considerations; the debts have benefited the part of the seceding state included in the cession before, and will do so probably in the future, or they can be regarded as generally hypothecated on the land so that a part of them will pass with the cession of a part of the land. Or again, as Huber says (p. 88), creditors of a state do not lend to a corporation accidentally in possession of a certain area of land, but to a territorial whole with its economic resources which is represented by its political organ, and the owner of the resources, taxes and customs duties is bound. This is practically Appleton's view (p. 90) and that of Cabouat (p. 176); it is also held by Calvo (i., 249), Bulmerincq (p. 198), Fiore (i., 226), and Rivier (i., 214). Among recent jurists Huber (p. 87) emphasises its basis on practice and insists on the empiric nature of International Law in a manner which is hardly consistent with his views as elsewhere expressed.

As a matter of fact there is considerable treaty evidence in its favour. In the case of the separation of Belgium from Holland in 1831 and 1839, and of the separation of Bulgaria, Servia and Montenegro from Turkey in 1878 (*cf.* Holland, *Studies*, p. 243), and of the grant of new territory to Greece (Treaty of 24th May, 1881, Art. 10), the European concert declared for the principle of taking over a part of the general debt of the ceded territory. When Sweden obtained Norway from Denmark (Treaty of Kiel, 14th January, 1814), she took over part of the general Danish debt. By the Treaty of Zürich of 10th November, 1859, Art. 2,

Sardinia took over forty millions of florins of the Austrian debt of 1854. By the Treaty of 23rd August, 1860, with regard to the cession of Savoy and Nice, France took over four and a half million francs of the Sardinian debt. Prussia and Austria, by the Treaty of 30th October, 1864, took over for the Duchies of Schleswig-Holstein twenty-nine million thalers of the Danish debt. Italy, by the Convention of 15th September, 1864, agreed to take over part of the debt of the Papal States, and by the Treaty of 24th August, 1866, undertook part of the Austrian loan of 1854, as in the Treaty of 1859 (Bluntschli, p. 82, denies this, but he has overlooked the stipulation in the treaty).

But the rule is not without serious exceptions. Some of the cases are, indeed, cases of exchange, as in the exchange of territories in Italy in 1844 between Austria, Sardinia, Tuscany and Lucca (Hertslet, ii., 1052), where no part of the general debt of any of the states was taken over. But neither the Treaty between Austria and France in 1859 regarding Lombardy, nor the Treaty of 1866 regarding Venetia, is a good example of the rule, since the quota of the debt taken over on these occasions was unusually small. In 1871 the German Government declined to take over any part of the French general debt; and in 1898 the United States did not take over any part of the Spanish local debt in Cuba, not to speak of the general Spanish debt. In the Treaties with the Transvaal in 1852, with the Orange Free State in 1854, with the Transvaal in 1881 and 1884, these states took over no part of the general British debt. In the Treaties for the cession of Louisiana in 1803, of Florida in 1821, of New Mexico and California in 1848, the United States took over no part of the general debt of France, Spain or Mexico, though in the latter case the provinces were of great value and a serious loss to the Mexican Republic. Nor is this merely recent practice, for the United States took over none of Great Britain's general debt in 1783.

These are weighty exceptions, and, besides, there is considerable juristic authority against the existence of the supposed law. Pradier-Fodéré (i., 275) holds that the new state is not normally bound by the obligations, other than local, of the ceding state, though of course treaties may in any special case alter this rule. Bluntschli (para. 48), though partly on incorrect grounds, opposes the rule, and Hall (p. 98, n. 2) states: "Fiore and other writers confuse local with general debt, and elevate into a legal rule the admitted moral propriety of taking over under treaty the general debt in the proportion of the value of the territory acquired." Westlake (i., 62) admits that the claim is only a moral one at least when the revenue of the ceded province has not been given as a security. The evidence of all those writers is the more valuable, inasmuch as they all hold in some form the doctrine of universal succession. But it is surely much simpler to hold that no such succession takes place in this case unless expressly provided by treaty, and this view is confirmed by the evidence of practice in cases of annexation as will be seen below.

Further evidence of the impossibility of laying down a law on this subject may be derived from a review of the different principles on which the proportion of the debt to be taken over has been decided. Huber (p. 91) enumerates four principles, adding that in many cases the amount appears to be fixed arbitrarily. The debt may be divided in accordance with (i.) the extent of territory taken over, or (ii.) the number of people, or (iii.) the taxable value of the land, or (iv.) the nationality of the creditors. The taxable value is preferred by Fiore (i., 226) and Appleton (p. 142), but examples of the other principles exist. But how can there be a legal obligation to take over a debt on the choice of four different theories of its amount? A further complication is introduced by Appleton (p. 114) who, in accordance with his general theory of state succession as an *arrogatio* holds that the debt is only a debt of the ceded province. But this is impossible to accept, for it rests on no evidence even of treaties, and leads Appleton (p. 139) to the untenable theory that if the cessionary state was a creditor of the ceding state it

remains a creditor of the ceding state and of the ceded province. This assumes that a ceded province has a right to remain under the new master a separate fiscal entity —a doctrine which is not supported by custom and is in itself very improbable.

Further difficulties are encountered when the question is asked in what way the creditors of the ceding state are to obtain their rights. Appleton (p. 152) holds that if by treaty a cessionary accepts part of the general debt of the ceding power and fails to pay it, and the creditor is unable to obtain satisfaction of the debt due from the ceding power, then the creditor can bring against the cessionary an *actio obliqua* analogous to that permitted by Art. 1166 of the Code Civil in order to force him to pay his quota to the ceding state, or what is better for themselves, as serving to reimburse them directly, creditors can bring an *actio directa de in rem verso* against the cessionary. Huber (pp. 228, 229) points out that the *actio obliqua* is only applicable where the *actio obliqua* is recognised by the laws of the country in which the action is brought, but even he thinks that the *actio directa de in rem verso* is possible. The claims of the creditors, he says, are purely a matter of civil law, and there is no undesirable mixture of private and public law. In cases where no quota of the debt is taken over by the annexing state there is no regress; the arguments given by Huber (p. 96) are that there is no analogy in civil law for such an action, and that treaty stipulations have the force of law, since the source of the latter is the same as that of the former. Further, if the cessionary has paid over a lump sum there is no regress, even if there has been collusion and the amount paid is not proportionate, as it should have been, to the taxable value of the ceded province.

There is surely something altogether unsatisfactory in these views. The *actio de in rem verso* is not one which any Court would allow in the absence of any municipal law enforcing it. Certainly I have been unable to find any report of or reference to such a case. Of course if a cessionary takes over part of the debt and issues bonds for it he can be sued on these bonds if the law of the state permits the Government to be sued, but if the state has merely promised by treaty to take over so much debt and has not done so, it is incredible that an action should lie at the instance of a private person to enforce it to implement its agreement.

The facts are easily explained without assuming any succession. Expediency naturally produces different results in different circumstances. In peace cessions of territory are naturally accompanied by the taking over of part of the debt of the ceding state; on the other hand cessions forced by war are naturally not accompanied by any such taking over as was the case in 1871 and 1898, or at best only a small part of the debt is taken over as in 1859 and 1866.

(*b*) In the case of debt raised for the purpose of the ceded territory or charged upon it, the rule laid down by the jurists is that the cessionary takes over all such obligations. The exact form of charge is not of importance for International Law. Treaties do not differentiate according to the nature of the charge, and it is doubtful whether the public law of any country, save perhaps Italy, permits a creditor to impound a security for a public debt. Huber, who divides the debt here classed as local into debts (*a*) having their origin in a certain area or contracted in its interest, (*b*) hypothecated debts, and (*c*) mortgage debts, admits (p. 101) that the sovereignty forbids interference with his powers of taxation, etc., and from the point of view of theory all these debts may be treated as one class.

Fiore (i., 223) says that "in case of cession, the following rule must be held to be agreed on unless there is an express provision to the contrary; the cessionary succeeds to the rights and obligations resulting from contracts regularly entered into by the ceding Government for any public interest of the ceded territory." Appleton (p. 80), in accordance with his own view, holds this opinion, but regards the debts as falling on the ceded province only. Wheaton (p. 45) and Wharton (i., 19) express the opinion in general terms. Hall and Westlake, cited above, also

hold the view. Calvo (para. 2487) writes: "The debts of the state, or public debts and mortgage debts, are considered as inherent in the soil, and not as personal to the sovereign under whom they have been contracted. This is a recognised principle of International Law, invariably observed in the different political treaties concluded since the commencement of this century. All these acts, and to cite only the principal, those of 1814, 1815, 1818, 1839, 1859, and 1860, establish that in case of conquest, of annexation, or of the erection of a territory into a sovereign state, a proportionate part, if not the entirety, of the public debts remain charged on the conqueror or the new sovereignty." (*Cf.* also Halleck, i., 76, 258.)

Of treaties in case of cession may be cited Art. 21 of the Treaty of Paris, which provided that "the debts which, in their origin, were specially mortgaged upon the countries no longer belonging to France, or were contracted for the support of their internal administration, should remain at the charge of the said countries." By the Austro-Bavarian treaty of 3rd June, 1814, regarding the Tyrol, Art. 7, the parties undertook to discharge the mortgage debts on the territories ceded or exchanged on either side. Similar arrangements were made by the Treaties between Austria, Prussia, Russia and Saxony of 18th May, 1815, regarding the cession of part of Saxony; like provisions exist in the treaties of 29th May, 1815, between Hanover and Prussia; 31st May, 1815, between Prussia and Nassau; and other examples of that period will be found in Hertslet, *Map of Europe by Treaty*, i., 310, 385, 466, 948; ii., 1052, 1117. There are such provisions in the treaty of Zürich of 10th November, 1859, Art. 7, in the treaty regarding the cession of the Ionian Islands to Greece, in 1863, Art. 3, and in the treaty of Prague, 23rd August, 1866, regarding Venetia. A similar provision occurred in the Conventions of 1881, Art. 11, and 1884, Art. 5, with the Transvaal; in 1831 a Protocol of the London Conference decided that the Austro-Belgium debt, having appertained exclusively to Belgium before its union with Holland, should rest in future solely on Belgium.

It is not, then, in view of this evidence—and many more examples could be given—surprising that Corsi (*Studi di diritto*, i., 44) holds that all debts pass over "*di pien diritto*," and adds that mortgage debts give the creditor a right to realise his security even against the cessionary. But we need not go so far as to claim this as a rule of law, for obviously expediency will produce the same results, and if universal succession is established as a rule, a grave difficulty must be faced in dealing with cases of annexation. Besides, even in cases of cession there are some difficulties. The United States refused to take over any part of the local Cuban debt after 1898, and though they could plead that they were only liquidators (Wheaton, p. 47), still they would not press Cuba to accept the debt. Again, when Peru was forced to cede territory, rich in guano and nitrates, to Chili after the unfortunate war of 1879 to 1881, the United States' Secretary of State wrote to the American minister at Peru on the 25th August, 1883: "If Chili appropriates the natural resources at Peru as compensation for the expenses of the war, she should recognise the obligations which rest on these resources, and take the property with a fair determination to meet all just encumbrances which rest upon it." Again, on the 29th December, 1883, he wrote: "The opinion of the United States heretofore has been that, as the foreign obligations of Peru, incurred in good faith before the war, rested upon and were secured by the products of her guano deposits, Chili was under a moral obligation not to appropriate that security without recognising the lien existing thereon" (Wharton, i., 350). It will be seen that the Secretary of State could not go beyond a moral obligation. Westlake (i., 63) thinks that there was, perhaps, no necessity to qualify the obligation as moral when the guano deposits had been pledged as security, but one must question this view. The guano deposits were, after all, only a secondary security; the debt was due by the state of Peru, which, to

encourage lenders, undertook to give them the security of the guano deposits. The lenders take the security subject to its continuing in the power of the state. If another power deprives the state of that property, the lender has still a good claim against the borrower, but he has lost his security. Against the conqueror he has no legal claim whatever, but he may have a moral claim, as urged by the Secretary of State in the Peruvian case. The moral claim need not be a strong one, since, if it could be held that it always existed, it would lead us again to an absurdity which we have before pointed out, that a state could secure itself impunity in wrongdoing by mortgaging all its territory to other lenders. Similarly, in the great controversy over Texas which will again be touched upon in Chapter XI., the British Commissioner held that "the obligation of Texas to pay her debts is not in dispute, nor has it been argued that the mere act of her annexation to the United States has transferred her liabilities to the Federal Government, though certainly as regards foreign governments, the United States is now bound to see that the obligations of Texas are fulfilled" (Wharton, i., 24).

The practice of England bears out the view asserted by its agent as regards Texas. In 1877, when the Transvaal was annexed for the first time, His Majesty's Government took over all the debt. The debentures taken over consisted of two loans, one raised at Capetown in 1873 of £63,000, the other at Amsterdam in 1876 of £93,833. The amount realised in both cases were not applied to the proper ends, yet the Government accepted the debts, and though the question of forcing the debenture holders to pay in some way—*e.g.*, by decreasing the interest—for the improved security resulting from the substitution of the British Government in place of the bankrupt republic was considered, it was decided to do nothing (*Parliamentary Paper*, C. 2144, p. 275). But, be it noted that the British Government had every motive to satisfy the creditors because the annexation of the Transvaal was already causing grave political unrest in South Africa, and a repudiation of the debentures would have caused much indignation among the Dutch holders in the Cape Colony and among foreign bond holders in Holland, an extremely undesirable contingency in view of the relation of the Transvaal Boers to the Cape Boers and the Netherlands. Further, the fact that the question of altering the terms of the debt were considered is a clear proof that His Majesty's Government did not regard themselves as legally bound. In the case of the annexation of Upper Burma, in 1886, no regular public debt existed, but the Government paid expressly as a matter of grace claims on account of monies *bonâ fide* lent for and expended on public purposes, all claims being considered strictly on their merits (*Parliamentary Paper*, C. 4887). In the case of the annexation of the Transvaal and the Orange Free State, in 1900, His Majesty's Government declined to recognise any legal liability for the debts of the conquered territories. In the case of the Rothschild Loan of the Transvaal, two and a half million pounds at five per cent., no payment of interest was made till August, 1901, nearly a year after the annexation, and then only on condition that the bond holders should surrender the half year coupon, due on the 1st July, 1900, before annexation, and should agree to be paid off at par on three months' notice. The public notice issued declared that to obtain repayment of the principal holders would be required to surrender their bonds, with all unpaid coupons, to the Crown Agents, and should they fail to do so, would be held to have forfeited all claim on His Majesty's Government, and would be dependant for payment of both principal and interest on the revenues of the Transvaal only, on which advances, made by Her Majesty's Government for the settlement of the debt, and for other purposes, would be a prior charge. In the case of the small Orange River Colony loan interest was regularly paid, but the public notice of 30th June, 1900, laid it down that "in making any such payment, neither the government of the Orange River Colony, nor Her Majesty's Government are to be taken, as in any way admitting any liability as to payment of interest in future, or as to

repayment of capital of said loan, nor as bound with regard to any matter or thing in respect to the said loan, or as to any liability of whatever nature heretofore incurred by the late Government of the Orange Free State, in respect to the said loan or otherwise." His Majesty's Government clearly recognised no legal liability whatever; they declined to pay the Transvaal coupon of 1st July, 1900, and arrogated the right of deciding the terms of repayment of the debentures. They recognised moral claims, or at least motives of expediency, which rendered it desirable to consult the interest of neutrals and other holders of bonds, but even the moral obligation could be restricted to the revenues of the conquered territories. Anything else would be absurd, for it would be ridiculous to take over the debts of a bankrupt state.

A similar absurdity would arise in taking over the war debt of a conquered state, or the war debt secured on the revenues of a province which is ceded after the war. The jurists do not, as a rule, discuss this point, but Westlake (i., 78, 79) distinctly considers that there is no succession in such a case. He argues: "Those who lend money to a state during a war, or even before its outbreak, when it is notoriously imminent, may be considered to have made themselves voluntary enemies of the other state, and can no more expect consideration on the failure of the side which they have espoused than a neutral ship, which has entered the enemy's service, can expect to avoid condemnation if captured," and he quotes Von Bar ("*Die Nation*," of 22nd April, 1899) as holding that Cuba would remain liable for so much of the loan money charged on her by Spain as had been spent on railways, harbours, and other works of civilisation for her benefit, but that neither Cuba nor the United States would be liable for so much as had been expended in maintaining by force her dependence on Spain. In any case a specific security of the Customs would not bind Cuba. As a matter of fact, Cuba has assumed none of the debt, and it is doubtful whether it is possible to follow Westlake in distinguishing classes of debt as heritable or not. It is unfair to regard persons who lend money to a state at war as enemies of the other country. It would be a serious blow to the rights of neutrals to do so, and is comparable with the attempts to brand all neutral trade as unfriendly (*cf.* Baty, *International Law in South Africa*, p. 31, and Von Bar there cited). It is simply a case of the application of the rule of expediency. The nature of the debt and of the creditors will determine whether it will be recognised or not. The Government of the South African Republic raised a loan, by Law No. 1 of 1900, for war purposes among its subjects by the issue of notes, and the Boer leaders at the negotiations of Vereeniging asked the British Government to accept a clause providing for the recognition of such notes as had been duly issued under the terms of the law, and for which valuable consideration had been given. His Majesty's Government declined to accept the clause, but in agreeing to a grant of £3,000,000 to relieve the wants of the Boers and to aid in their restoration to their homes, allowed all notes issued under Law No. 1 of 1900 for valuable consideration to count as evidence of war losses. Even in this extreme case His Majesty's Government did not act on the strict rule of absolutely excluding a war debt, but recognised it so far as it was expedient to do so (*Parliamentary Paper*, Cd. 1096). The actual payments, however, did not exceed two shillings in the pound (*Report of Central Judicial Commission*, 1906). The legal position of the Government towards the debt was clearly laid down in Lord Roberts' Proclamation No. 3 of 1900, dated 6th June, which recites that the Government of the South African Republic had issued certain notes, payment of which had been guaranteed on the security of the immovable property of the state, and announced that Her Majesty's Government declined to recognise the validity of such notes or the rights of the South African Republic to hypothecate the property of the State in this manner, and that such notes when presented for payment would not be honoured (*Parliamentary Paper*, Cd. 426, p. 9).

II. In the case of debts of municipalities no real case of state succession arises. Normally the municipality is treated exactly like a private individual whose economic position is not affected by the change of state. Whether in cession or annexation if there is in the ceded or conquered territory a municipality its debts persist despite the change of master. If it owes money to the state the creditor changes in personality; that is all. On the grounds urged above, if a part of a municipal area were ceded or annexed it would follow that the debt fell on the part in which the central body of the municipal area was situated. As a matter of fact these details are, in cases of cession, always regulated by minute rules in treaties (*see* Huber, pp. 110, 111, 240–243), but these treaties present nothing of theoretic interest, and need not here be further discussed.

(*b*) The second great question is that of liability for concessions and contracts other than public debts. In the case of public debts questions of public credit and the interest of third parties have so strong an influence as to interfere with legal theory, while in the questions now discussed as nationals are mainly concerned Governments have a much freer hand. As in the previous case, the great majority of jurists lay down the rule of universal succession to all contracts or concessions. Concessions are in theory merely a particular kind of contract, and are constantly classed as such in treaty stipulations, and can best be treated here. Under contracts are included those of the postal and public works departments, of the army and navy, subsidies to societies, the management of state lands, etc.

It must suffice to cite some of the leading assertions of the ordinary doctrine. Pradier-Fodéré (i., 277) says that the whole of the belongings of the state pass actively and passively to the successor of the annexed state. Appleton (p. 26) says that the state is substituted, as regards debts, to the state which has disappeared, and explains it on his *arrogatio* theory. So Selosse (pp. 168, 169), Bluntschli (para. 54), who uses the same language as Pradier-Fodéré, and Holtzendorff (ii., 37). Fiore (i., 222) and Martens (i., 368) are equally strong. Westlake (i., 75) expressly states that the acquiring state steps into the civil liabilities of the displaced state, though of course in the case of a partial cession only into those of them which exist in connection with the ceded territory. Hall (p. 99) accepts the doctrine in general terms, so do Heffter (para. 24) and Wheaton (p. 46), followed by Wharton (i., 19). Reference may also be made to Calvo (para. 2483), Rivier (i., 213), and Gabba (p. 384), who all treat conquest and cession alike. The theory is also very energetically supported on behalf of the Netherlands South African Railway Company in its dispute with the British Government, by the French Government, and by Professor Meili, of Zürich, in a pamphlet (*Die Rechtstellung der Niederländisch-Süd-Afrikanischen Eisenbahngesellschaft gegenüber Grossbritannien als Rechtsnachfolger der Süd-Afrikanischen Republik.* Zürich, 1903, pp. 23–36), and briefly by Sir Thomas Barclay (*Law Quarterly Review*, xxi., 300 *seq.*), while Huber's book is mainly devoted to this theme. In addition to the jurists there is a formidable list of treaties. The treaty of 10th November, 1859, confirms railway concessions granted by the Austrian Government (Art. 2), and recognises all contracts regularly made by that Government (Art. 9). The treaty between France and Sardinia of 23rd August, 1860, states (Art. 5) that France succeeds to the rights and obligations resulting from contracts regularly made by Sardinia for objects of public interest concerning especially Savoy or Nice. The treaty of 30th October, 1864, between Austria, Prussia and Denmark contains (Art. 17) a precisely similar stipulation, as does the treaty of 3rd October, 1866, between Austria and Italy (Art. 8). England, in ceding the Ionian Islands in the treaty of 29th March, 1864 (Art. 7), stipulated that Greece should take over all contractual obligations; so all trading and mineral concessions by the Government were safeguarded by the treaty for the cession of Heligoland of 1st July, 1890 (Art. 9). The concessions of British subjects in Swaziland were guaranteed by Art. 7 of the Convention

with the Transvaal of 10th December, 1894. The United States treaty with Spain of 10th December, 1898, provided for the recognition of contracts and concessions, including patents and copyrights. So the Bank of Annecy, in Savoy, is confirmed in its concessions by Art. 6 of the treaty of the 23rd August, 1860, while Art. 8 of the same treaty protects patents. The treaty of the 3rd October, 1866, contains (Art. 10) a similar recognition to that of the treaty of Zürich regarding railway concessions. The treaty of the 11th December, 1871 (Art. 10), confirms patents granted to Frenchmen in Alsace-Lorraine; the treaty of 1st July, 1890, recognises Lloyd's signalling rights in Heligoland (Art. 12–6), besides other Government concessions. It may also be added that the Prussian Government in taking over Hanover, Hesse, Frankfurt, Nassau and Schleswig-Holstein (Royal Patents of 3rd October, 1866, and 12th January, 1867), which are cases of annexation by conquest, took over and recognised all Government concessions and contracts. There were obviously strong grounds of prudence for such action, and similar motives caused Sardinia to recognise concessions and contracts when annexing Tuscany, Parma, Modena, the Romagna, Umbria, the Marches, Naples and Sicily in 1860, in all of which cases the people of the provinces had by plebiscite expressed their desire to become Italian citizens.

Besides these treaties there is some judicial and political authority. Mr. Adams, United States Secretary of State, on the 10th August, 1818, wrote: "The conqueror who reduces a nation to his subjection receives it subject to all its engagements and duties towards others, the fulfilment of which then becomes his own duty. However frequently the instances of departure from this principle may be in point of fact, it cannot, with any colour of reason, be contested on the ground of right." (Wharton, i., 19.) It is to be noted, however, that Mr. Adams is contending for a point, and that he admits his rule has not always been observed in practice. There is also the dictum of Malins, V.-C., in *Doss* v. *Secretary of State for India* (19 Equity, at p. 530): "It has been argued, and I entirely agree in that argument, that every state which takes possession of the territories of another, whether it be by force, as in the case of the annexation of Lucknow, or whether by treaty, as in the case which has been brought forward of the annexation of Texas to the United States of America, takes the annexed territories liable to the debts and loans which exist on its revenues." This dictum does recognise in the fullest manner the right of succession, but it is isolated, and the case was decided against the plaintiff on other grounds. The nearest approach to a parallel passage is a dictum of Kelly's, C.B., in *Frith* v. *The Queen* (7 Exchequer 365), where a person sought to recover from the Crown a debt alleged to have been due to his predecessor in title from the sovereign of Oude before the annexation of that kingdom in 1856. Kelly, C.B., said: "It is objected that no liability capable of being enforced judicially was incurred by the East India Company, and therefore that none was transferred by the Act of 1858 to the Secretary of State, but I cannot assent to this argument. If the law be, as for the present purpose I assume it is, that by annexation the debts and liabilities of Oude pass to the East India Company, it cannot but be that some right of action against the company existed, and that right of action must now be enforced, not by petition of right, but against the Secretary of State." This is, however, of comparatively little value, as being a mere assumption for purposes of argument. The following passage may also be compared: "I apprehend it," said James, V.-C., "to be clear public universal law, that any government which, *de facto*, succeeds to any other government, whether by revolution or by restoration, conquest or re-conquest, succeeds to all the public property, to everything in the nature of public property, and to all right in respect of the public property of the displaced power, whatever may be the nature or origin of the title of the displaced power. This right of succession is a right not paramount but derived through the suppressed authority, and can only be enforced in

the same way and to the same extent and subject to the same relative obligations of rights as if that authority had not been suppressed, and were itself seeking to enforce it." (*United States* v. *McRae*, 8 Equity 75; *cf. Republic of Peru* v. *Peruvian Guano Company*, 36 Ch. D. 489; *Republic of Peru* v. *Dreyfus*, 38 Ch. D. 348). This dictum, however, was made in a case which was one of succession to a belligerent government, not of state succession, and it deals with the case of an action being brought by a successor not in its own courts but in the courts of a third power, and has little weight.

One very recent attempt has been made to maintain the doctrine that a state is bound by the obligations of its predecessor—viz., that of Lord Robert Cecil in his argument in the *West Rand Central Gold Mining Company* v. *The King*. He cited Hall, Halleck (ii., 504), Calvo (i., 298), Heffter (para. 25) and Huber (especially paras. 217, 218), but he was forced in the course of argument to make serious admissions. He had to admit that he must argue that even war debts were taken over, and, in view of the English decisions, that the king could, at the moment of taking over the country, decide to what extent he would take over debts. This last admission ruined the theory, for the liberty of choice, even if restricted to the moment of annexation, which it cannot logically be, negatives the possibility of regarding the conqueror as legally bound, and reduces the whole question of succession to a matter of prudence and equity.

The doctrine of succession is fully recognised in the Italian courts, which, in accordance with the Civil Law, have assimilated as closely as possible the position of a creditor of a state and of an individual. The cases are cited in Gabba (pp. 377 *seq.*) and in Holtzendorff (ii., 40). The most striking are the decisions of the Court of Cassation in Florence of 26th July, 1878: "The principles of public law provide that when it is a case of partial cession of territory the obligations contracted by the state with regard to the ceded territory pass with that territory to the state which succeeds," and of 15th December, 1879: "By public law, the state which succeeds in one part of the territory of another state is bound, independently of special conventions, by the obligations legally contracted by the latter regarding the territory in which it succeeds." The same Court, in a judgment of 25th May, 1896, decided for the plaintiffs, in a case where the Italian Ministry of Finance was sued for the price agreed upon with the Austrian Government for the execution of certain works of fortification, on the ground that the works were executed for the security of the Venetian province, even against Italy.

On the other hand must be set the fact that the Court of King's Bench in a most careful judgment, despite the authority of Hall, Halleck, Heffter, Calvo, Huber, Malins, V.-C., and James, V.-C. declined in the case of the *West Rand Gold Mining Co.* v. *The King* to admit that there was such a doctrine of International Law (*see* 1905, 2 K.B. 498 *seq.*). Again, the Court of Appeal in Florence, in a judgment of the 23rd October, 1871, reduced state succession to a moral obligation. It is true that, as Gabba says, the judgment is out of harmony with the tenour of Italian decisions, but it must be borne in mind that the Lombards and Venetians were Italians in all but allegiance before 1859 and 1866, and that the Italian Courts were merely recognising rights of Italians and kinsfolk. There were evidently strong grounds of expediency for the view taken in later decisions of state succession. Further, two considerations must be taken into account in estimating the weight of these decisions as declarations of International Law—viz., (*a*) the fact that the Treaties of 1859 and 1866 expressly provided for the recognition of contracts, and so, no doubt, led the Italian Courts to assume that they were desired to recognise all quasi-contract rights against the Government; and (*b*) that the Government by circular had in several cases already accepted obligations—*e.g.*, by circular of 16th August, 1860—for the payment of requisitions.

Turning now to British practice, on the annexation of the Transvaal in 1877 His Majesty's Government assumed responsibility for the debts of the Transvaal,

including an item of warlike stores purchased for the Secoconi war, but not paid for, amounting to £30,381, and debts to banks of £28,946 (*Parliamentary Paper*, C. 2144, p. 278). This was obviously politic, as the country had been annexed against the will of its inhabitants, and every concession was desirable. On the annexation of Burma claims for goods actually supplied to the late Government were met, but incomplete contracts were not recognised, and all cases were treated strictly on their merits. In the case of the annexation of the Transvaal and Orange River Colony in 1900, the practice of the Government as to ordinary contracts was briefly—(i.) The general principle was laid down that completed contracts gave no right to payment by the Colonial Governments. (ii.) Executory contracts were not recognised, nor was compensation paid in respect of them. (iii.) In certain cases articles ordered and delivered but not paid for were taken over by the Government and paid for, a fresh contract being made between the Government and the suppliers. The general principle was established to be legal by the West Rand Gold Mining Company case above referred to, which rose out of the seizure by the Government of the South African Republic on the 2nd October, 1899, of certain gold. The case was argued on the basis that the South African Republic was under an obligation to make good the gold commandeered, though very possibly it was a mere case of tort.

Special importance attaches to the dealings of His Majesty's Government with concessions. A notice was issued by the Transvaal Government on 8th September, 1900 (*Parliamentary Paper*, Cd.623, p.5) to the following effect: "Every concession granted by the Government of the late South African Republic will be considered by Her Majesty's Government on its merits, and Her Majesty's Government reserves the right to decline to recognise or to modify any concession which may appear on examination not to have been within the power of the Government of the late South African Republic, having regard to any conventions or agreements made between Her Majesty's Government and the Government of the late South African Republic, or to have been granted without proper legal authority or contrary to law or the conditions of which have not been duly complied with or which may appear to affect prejudicially the interests of the public." All concessions were examined by a Commission, which reported to the Secretary of State on the 19th April, 1901. They expressly state (*ibid.*, p. 7): "Though we doubt whether the duties of an annexing state towards those claiming under concessions or contracts granted or made by the annexed state have been defined with such precision in authoritative statement, or acted upon with such uniformity in civilised practice as to warrant their being termed rules of International Law, we are convinced that the best modern opinion favours the view that, as a general rule, the obligations of the annexed state towards private persons should be respected. Manifestly, the general rule must be subject to qualifications—*e.g.*, an insolvent state could not by aggression, which practically left to a solvent state no other course but to annex it, convert its worthless into valuable obligations. Again, an annexing state would be justified in refusing to recognise obligations incurred by the annexed state for the immediate purpose of war against itself, and probably no state would acknowledge private rights, the existence of which caused or contributed to cause the war which resulted in annexation."

"Subject to these reservations His Majesty's Government, in dealing with the concessions in question will probably be willing to adopt the principle which, in the case of the annexation of Hanover by Prussia, the modern case most nearly corresponding with that under consideration, was proclaimed by the conqueror in the following terms: 'We will protect every one in the possession and enjoyment of his duly acquired rights' (Royal Prussian Patent of 3rd October, 1866)." They advised that the cancellation of a concession could properly be recommended when (i.) the grant was *ultra vires* the late Government; or (ii.) in breach of a treaty; or (iii.) was acquired by fraud or other unlawful means; or (iv.) the holder of

the concesssion had failed, without lawful excuse, to fulfil its essential conditions; or (v.) the maintenance of the concession was injurious to public interests. In case (v.) they considered compensation equitable, the amount of such compensation to depend on such points as the question whether the owner knew when he received it that the concession was precarious or not. They recommended (p. 34) the cancellation of the concession of the Netherlands South African Railway and that the ordinary shareholders should receive no compensation because the railway company had actively assisted the South African Republic in the war. This advice was followed (*see* Barclay, *Law Quarterly Review*, xxi., 300 *seq.*). The shareholders of the Selati Railway were not held entitled to compensation, but the debenture holders were; similarly the cancellation of the dynamite concession was recommended and acted upon (p. 94).

Again, it may be noted that though by the Treaty of 11th December, 1871, between Germany and France, Art. 13, all contracts by the French Government were recognised, yet by Art. 16, by which five railway concessions were recognised, four more were left to the consideration of Germany.

The difficulty of the usual theory is, however, most clearly seen when the question of contracts made for war purposes is considered, or it is sought to determine the limits of the state's responsibility for contract debts. Huber (p. 158) lays it down that there is no *beneficium inventorii* in state succession for the following reasons: (i.) The *beneficium* is really opposed to the idea of succession and is a late introduction even into private law; (ii.) in private succession the successor has no option but to succeed, not so in state succession; (iii.) the goods of a state admit of no accurate valuation; (iv.) the inheritance of all rights and obligations is an essential consequence of state succession, and is inconsistent with the *beneficium*. Westlake (i., 76) disputes these views; (i.) the benefit has existed in Roman Law as the latter has stood since the commencement of International Law; (ii.) a private successor need not accept the succession, and so, if he does come in, comes in voluntarily; (iii.) that the assets cannot be exactly valued does not prove that there is no reasonable limit to them. He suggests as more solid considerations the fact that either the annexed territory and population would be so merged in the conqueror's territory and population that their taxable capacity cannot be easily determined, or if the province is maintained as a separate union for fiscal purposes, for political reasons it may not be required to contribute the full amount of taxation which it could bear. He admits, however, that the conduct of the annexing state suggested in the latter case can scarcely be presumed, and concludes that if the annexed territory is merged in the annexing state for revenue purposes, the liability of the latter will be unlimited, but that if it is maintained as a separate fiscal unit the obligations of the extinguished state, or in case of cession, the obligations connected with the ceded territory, will not pass over beyond the value of the assets received, including such taxation as it can reasonably bear without reference to the political convenience of the annexing state. This is practically Appleton's theory (pp. 65 *seq.*).

Huber's view has undeniably the advantage of Westlake's in logical consistency. If universal succession is a rule of law, there is on Westlake's view a completely illogical separation of the cases where the integrity of the province is maintained and where it is disregarded. That is really a matter of Municipal Law, not one of International Law. Huber correctly recognises that on the *beneficium inventorii* theory Courts would be set the hopeless problem of deciding whether a certain claim could or could not be met out of the assets accruing from the conquest. This is absurd, and he accepts, therefore, a succession to all rights and obligations, which, as he says, is the real meaning of a universal succession, whether in the case of an individual or a state. The *beneficium inventorii* is, strictly speaking, a negation of the idea of a universal succession, and reduces the heir to a sort of administrator or executor.

Now on this theory we are bound to regard the successor as heir to all obligations arising out of the war of annexation. Huber admits (p. 114) that the usual practice is to regard a ceding power as responsible for its requisitions in the ceded territory, though he does not explain how this can be reconciled with his theory, which indeed it flatly contradicts. Fiore (i., 224) says that as the state has not lost its juristic existence or identity it remains liable despite the cession. In the treaty between Prussia and Westphalia, of 28th April, 1811, the King of Prussia was bound to pay requisitions made by his Government in the ceded territories, the French paying only their own requisitions (Art. 3). In Art. 17 of the Treaty of Schleswig-Holstein, of 30th October, 1864, debts relating to the war are excluded from the general taking over of liabilities. The Commissioners regarding Transvaal Concessions (*Parliamentary Paper*, Cd. 623, p. 7), exclude such debts.

On the other hand, Gabba (p. 383) accepts such debts, but as he accepts also claims in tort, or quasi-tort—*e.g.*, damage done in the course of war—his authority is hardly great. Westlake (i., 81) says that in the case of the state being extinguished it is not generally thought that obligations such as requisitions, damage done (which lies rather in tort), or contracts relating to the ordinary course of war, do not pass to the annexing state, and relies on the cases of the Italian Courts referred to above (*see also* cases cited in Fiore, p. 224, n. 1) as showing that the cessionary, even in case of cession, takes over such obligations. The Italian Government, by a circular of 16th August, 1860, accepted responsibility for the losses caused by the requisitions of the Austrians in Lombardy, and an Imperial German Law of 14th June, 1871, awarded compensation to the inhabitants of Alsace-Lorraine alike for requisitions made by France and Germany, but both these cases are capable of explanation on the ground of expediency.

On the other hand, as in the case of the Transvaal War debt, His Majesty's Government emphatically refused to admit that they were under any liability to pay for requisitions made by the Boers, either upon Boer or British subjects. The Boer negotiators of the Vereeniging terms of peace (*Parliamentary Paper*, Cd. 1096, p. 7) proposed that receipts given by the Boer officers in the field could be presented to the British Government for payment, subject only to the proviso that the amount of these receipts, together with the amount of the war debt, should not exceed three million pounds. The British Government refused the terms, and, instead, insisted on treating the sum of three millions merely as an *ex gratia* grant for the relief of the ex-burghers, allowing receipts only to count as evidence of war losses in estimating what amount of the funds for relief should be awarded to each claimant. Later on, a similar grant of two million pounds was made for the relief of British subjects whose property had been ruined, whether by Boers or British in the war. This also was a pure act of grace, as is clearly proved by the fact that limited companies and large firms were not allowed to be considered as claimants (Mr. Chamberlain in *Times*, 3rd April, 1903). On the other hand, requisitions made by the British troops, as contrasted with those made by the Boer troops, were paid practically in full.

If universal succession is a rule of law it must apply to war debts. It may be argued that universal succession is a rule of law for debts other than those contracted for purposes of war, but to hold this, besides being illogical, would lead in practice to the courts being presented with insoluble questions as to whether a certain debt was really contracted with reference to war or not. The fact is, that the matter depends on considerations of expediency and fairness which preclude the existence of a legal rule, even in the sense of a rule of International Law. These were the considerations which led the Transvaal Concession Commissioners to conclude that the doctrine of universal succession was hardly a legal one, and they do not deserve Westlake's strictures, for they did not arrive at the conclusion because no action lay in an English court, which

I admit would not be conclusive against it being a rule of International Law, but because of the lack of sufficient authoritative usage and of satisfactory principle to support the alleged rule. But if the doctrine is interpreted logically and applied to war debts, then, unfortunately, it is in conflict with many treaties, with decisions of the English courts, and with the practice of the British Government in the case of the Transvaal and the Orange River Colony, which must be considered the greatest and most authoritative modern examples of state succession, and with which any theory must reckon. Moreover, as has been seen above, it leads to absurd conclusions. On the other hand, the adoption of the theory that there is no legal liability leaves it open for the conqueror or cessionary to decide his action on grounds of morality, expediency, and state policy, including the very important question of the rights of the neutral.

(*c*) The third of the contractual relations to be considered is the question of deposits, officers' caution-money and judicial deposits. The general rule in cases of cession is that the ceding state is bound to repay all such deposits to the depositors, while its subjects who have not changed their nationality at the cession are entitled to be reimbursed by the cessionary government the amount of their caution-money, deposits, etc. This is provided for in the Treaties of 10th November, 1859, between France and Austria, and of 30th October, 1864, between Austria and Italy. Art. 4 of the Treaty of 10th May, 1871, between France and Germany, applies the rule to (i.) deposits by communes; (ii.) deposits on account of military service; (iii.) caution-monies; (iv.) court deposits. There are many variations in detail (Huber, pp. 119, 123), but it is only fair that these arrangements should be made as they affect individual rights far more than public rights, though it is impossible to lay down a rule of law. It is not, therefore, surprising that in case of annexation such rights are often respected. On the annexation, in 1877, of the Transvaal, there was found to be a deficit of £10,000 in the Orphan Chamber of the Transvaal, representing defalcations in the Orphan Master's Department, but the British Government assumed liability (*Parliamentary Paper*, C. 2144, p. 279). So in 1900, in both the Transvaal and Orange River Colony, responsibility for savings-banks deposits and for funds entrusted to Orphan Masters was accepted without difficulty. Similarly, the fund which existed for pensions for the State Artillery of the South African Republic was respected, but as it was insufficient for the purposes for which it was destined, no fresh pensions were granted, and the old ones had to be reduced. In the case of *Van der Vijver* v. *The Colonial Treasurer*, the High Court of the Orange River Colony held (1903, Orange River Colony Reports, 32) that the school fund of the Orange Free State could not be confiscated by the conqueror. This decision is interesting, but the case was not sufficiently argued, nor was the Court a sufficiently strong one to render its judgment of much weight.

The reason why these debts are recognised is obvious. As will be seen in Chapter IX., there is a rule that the successor does not succeed to any of the private property of the subjects of the state. It introduces its legislative power, and can do what it likes with private property by legislative acts, but the mere succession, *ipso jure*, alters nothing. Now, the money deposited in a savings bank is indeed in the hands of government, but to appropriate it would be to violate the maxim regarding private property, and, from another point of view, it would be to violate the usual practice regarding state debts. In the case of orphan chamber funds the property is in the hands of the government for safe keeping, and there is no contract with regard to it between the government and the owner. If there were a contract, the annexing state could, if it liked, in strict law repudiate any liability. But, in this case, there is no contract. In the case of the savings bank there is usually a contract between the savings bank and the individual, and repudiation would be legally possible. In practice the deposit would be treated like a public debt. On the other hand, monies deposited in

connection with exemptions from military service might legally be confiscated, and possibly might, in practice, be appropriated by the conqueror. The same remark applies to caution-monies, but in both cases ethical considerations would probably intervene.

(*d*) The last question is that of the pay and pension of officials. The question of pay really depends on the question of the duty of the cessionary or conqueror to continue the employment of officers of the old state, which has been discussed in Chapter V. above. With regard to pensions, the rule laid down by Huber (p. 115) is that, as in the case of local debts, the cessionary must take over the pensions of all those pensioners who acted in the ceded territories; the conqueror (p. 159) takes over all pensions. In practice the rule is much the same; the cessionary takes over the pensions of those who become his subjects; the ceding power remains responsible for the pensions of those who determine to retain their nationality. By the Treaty of Paris of 30th May, 1814, the French Government was relieved of the payment of all pensions of those who ceased on the cessions of French territory to be French subjects. By the Treaty of 23rd August, 1860, between France and Sardinia, France undertook to pay the pensions of Sardinian pensioners who became French, and a similar provision was included in the Treaty with Monaco of 2nd February, 1861, regarding the pensioners of Mentone and Roccabruna. By the Treaty of the 11th December, 1871, Art. 2, Germany undertook to pay all pensions of persons in Alsace-Lorraine who opted for German nationality, and all military pensions. Other examples are given by Huber (p. 252) and Appleton (p. 175). In the case of assimilation of a whole territory, there is the Treaty of the 7th December, 1849, for the incorporation of the Hohenzollern principalities in Prussia, Art. 5, and the principle was recognised in the case of the cession of the Ionian Islands to Greece, by Art. 8 of the Treaty between the Great Powers of 29th March, 1864.

In cases other than those of cession there is the example of Great Britian in the annexation of the Transvaal in 1877. On that occasion arrears of salary were taken over and paid (*Parliamentary Paper*, C. 2144, p. 276). In 1886, on the annexation of Upper Burma, arrears of salary due to foreign officials were paid, but not arrears due to Burmans, as there was no regular system of salaries in force, in their case, before the annexation. The main motive for paying the salaries of foreign officials appears to have been to get them to leave the country, and thus to remove sources of possible disturbance. These cases of arrears of salary must be regarded as the same in principle as pensions, both being payments for past services. On the annexation of the Transvaal and the Orange River Colony, in 1900, unpaid salary claims were, as a rule, rejected. By a Transvaal Government Notice, No. 224 of 1903, however, it was intimated that the government would assist, in deserving cases, members of the administrative and clerical branches of the civil service of the Transvaal, who had been deprived, by the conquest, of their employment, and who were in indigent circumstances; but it was expressly stated that "the Government recognises no liability for arrears of salary due by the late Government; any assistance given will be in the nature of an act of grace, and based on the necessity of each particular case." His Majesty's Government have also distinctly repudiated any liability for pensions drawn under the old Governments of the Transvaal or of the Orange Free State, and in a few cases only have continued them as a matter of special favour.

This important precedent is against Huber's theory, which, indeed, suffers severely in the varying nature of treaty arrangements (*cf.* Huber, pp. 116, 117). The true view seems to be that (*a*) there is no legal obligation to pay arrears of salary or pensions, but (*b*) equity or expediency may dictate such payment. In treaties of cession pensions are often expressly safeguarded. The discretionary nature of the action, where there is no treaty, is shown by a recent decision of the

Transvaal Government to appropriate a sum not exceeding £50,000 for the payment of arrears of salary due to old servants of the state. It will be noted (i.) that a special vote of the Legislature is required, there being no legal liability; (ii.) the sum assigned is strictly limited; (iii.) payment is only to be made in respect of civil service, excluding any periods during which the civil servant was on commando; (iv.) payment is only to be made up to either the date of the annexation of the Transvaal or the date of the effective occupation of the district in which the civil servant was stationed, whichever date occurred earlier. (Transvaal *Hansard*, 1904, 1905, 2179–2190; Reports of Unpaid Salaries' Commission in Transvaal *Parliamentary Papers*.)

II. We now proceed to the consideration of the liability of the successor for the torts of his predecessor. On this subject there is little clear authority. Many writers use vague language which does not discriminate between the classes of obligations taken over by the successor. Wheaton (p. 48) uses language which would certainly cover cases of tort, even when a state succession takes place, but the examples there given of the disputes of the United States with Holland, Naples and France, relative to wrongs inflicted on the subjects of the United States during the revolutionary wars, do not really bear on the point at issue. In the case of Naples and France the only matter in question was the responsibility of a Government, despite internal changes in its constitution—a doctrine which does not solve questions of state succession. The result of the dispute with Holland appears to be incorrectly summarised. The despatch of Mr. Fish, quoted in Wharton (ii., 49–58), clearly shows that the United States did not press the claims of its subjects, which were based on tort, against the Netherlands, after they had definitely ascertained that the kingdom of the Netherlands repudiated the continued identity of the state on the basis of the alteration of its form of government, the enlargement of its territories, and its historical vicissitudes. This case, therefore (*cf.* Hall, p. 570), is, so far as it goes, strong evidence that states do not recognise claims founded on torts as binding a successor.

Gabba (p. 383) writes: "Others are of the opinion that, independent of treaty, and in virtue solely of the juridical principle of succession of state to state, every heritable obligation incumbent on the ceding Government to a private person, appertaining to the province annexed to the kingdom of Italy, must be recognised and satisfied by Italy; that, in consequence, the eighth article of the Treaty of Zürich, which contemplates only one species of such obligations, viz., the contractual, cannot prevent others also which have a different origin having to pass like contractual obligations to the Italian state from the Austrian state." He proceeds to quote the circular of the Minister of the Interior, of the 16th August, 1860: "The King's Government assumes the responsibility for and has decided in the Council of Ministers to consider at the cost of the state the compensation for the losses arising out of the requisitions regularly made by the Austrians in Lombardy," and judgments of the Court of Cassation at Turin, of 21st December, 1881, 6th July, 1877, and 19th February, 1881, of the Court of Cassation of Florence, of 21st July, 1878, and 15th December, 1879, and of the Court of Venice, of 19th June, 1879. These examples are, however, mainly of quasi-contract; requisitions in war, as distinguished from mere damage, are really contracts in which there is an implicit promise of payment, even when no formal receipt is given, and, therefore, these cases do not prove more than that a state which recognises succession to contract liabilities is naturally ready to extend that recognition to liabilities which rest practically on contract.

Besides, it will be noted that Gabba distinctly refers to heritable obligations (*obbligazione patrimoniale*) and, so far as I can find, this term in Italian Law does not extend, at any rate, to all torts. The term is borrowed from Roman Law, and

under that law, as a general rule, liability for torts was not heritable (*cf.* Moyle, *Justinian*, i., 597). What would be of greater value for the purpose of Gabba's view would be to find that the Italian Courts recognised a legal liability on the Italian Government to pay compensation for the damage done as distinguished from the requisitions made by the Austrians during the war. This they do not even appear to have done. It might, of course, be argued that damage done in war might not be regarded as being tortious at all by Austrian and Italian law, as it is not in English law or in Roman-Dutch law or in the law of the United States (Wharton, ii., 582), but if the Italian Government accepted legal liability for the requisitions of the Austrians it is certainly hard to see why they should not have accepted liability for damage done, except on the broad doctrine that there is no succession to liabilities from tort. As a matter of fact, in 1866 the crops in the provinces of Mantua and Venice were destroyed before the declaration of war by the Austrians for purposes of defence, and the Italian Government declined to accept responsibility for the action (Huber, p. 250).

Huber himself (p. 115), following Gabba, states: "Non-contractual obligations of the state are to be classed with contractual obligations of the state. It is not a mere substitution in the contracting party; it is a universal succession in the whole sphere of rights, a substitution in all functions." It may be noted that the Attorney-General of England, in his argument in the *West Rand Central Gold Mining Co.* v. *The King* (at p. 114 of the separate print of the judgment) argued that Huber did not hold that obligations *ex delicto* pass over to the successor, and, in support of this opinion, quoted Huber's remarks on pp. 65, 66. This, however, is a misunderstanding of Huber, who in the passage cited is dealing with obligations not between the state and individuals, but between the state in a case of cession of a portion of territory and a third state, not individual, which has been wronged by the ceding state. The Attorney-General's inference from this passage is therefore wrong.

Huber's theory is logical, and avoids the arbitrary separation of contractual and non-contractual obligations. On the theory of universal succession and the parallel of state succession to a mere change of Government, the passing over of obligations *ex delicto* is really necessary, and those who, holding the doctrine of universal succession, deny the passing over can only base their argument on an inaccurate analogy of private law. But it does not seem possible to obtain any evidence of practice in support of the theory other than the Italian cases which have been shown above not to be really relevant. It is true that in an Imperial German Law of the 14th June, 1871, sec. 1, Germany provided from the funds derived from the indemnity paid by France compensation for damage to movables and immovables caused by commandeering or burning for military purposes, whether by French or German troops, in Alsace-Lorraine, and though restricting compensation for destruction to movables by the law, sec. 1, sub-sec. 4, to persons domiciled in Germany and being German subjects (unless France should pass reciprocal legislation), yet actually paid compensation to all French subjects as well. But this is merely a sign of the affluence and consequent generosity of Germany resulting from the indemnity. The law applied to all other places in Germany as well as in Alsace-Lorraine, and was a measure of politics and not an admission of legal liability. Similarly, the United States, by the treaty of 10th December, 1898 (Art. 5), undertook to satisfy the claims of its nationals against Spain, so far as they had risen since the commencement of the Cuban insurrection.

In the case of English jurisprudence the rule is that the state itself recognises no liability for tort, and therefore if it succeeds another state it equally recognises no liability for the tort of its predecessor, whether or not its predecessor by its laws admitted liability in tort. It was finally decided in *Tobin* v. *The Queen* (16 C.B. N.S. 310), and *Feather* v. *The Queen* (6 B. & S. 257), that no petition of right lies in a case of tort, and this principle received formal approbation in the case of

the *West Rand Central Gold Mining Co.* v. *The King.* Attempts have been made from time to time to sue the Government through a superior officer for tort. These, however, have constantly been unsuccessful. The earliest case is one of 1701 (*Lane* v. *Cotton*, 1 Lord Raymond, 646), where it was attempted to hold the Postmaster-General responsible for the loss of certain exchequer bills in the post. The case was confirmed by Lord Mansfield in *Whitfield* v. *Lord le Despencer* (2 Cowper, 704), and has since been followed in *Raleigh* v. *Goschen* (1898, 1 Ch. 73, *per* Romer, J.), and by the Court of Appeal (Collins, M.R., and Matthews, L.J.), in *Bainbridge* v. *The Postmaster-General* (*see* 22 T.L.R. 70, and *Times*, 18th November, 1905), where it was attempted to hold the Postmaster-General responsible for personal injuries caused by the negligence of one of his servants. These cases turned on the question whether the maxim *respondeat superior* was applicable to a relation like that of Postmaster-General and post office official, but it has been held that there is no such relation of inferior and superior, for both are alike servants of His Majesty and each is only liable for personal torts (*cf.* *Graham* v. *Public Works Commissioners*, 1901, 2 K.B. 781, which was an action for breach of contract). Of course, if the head of a department could be sued the same effect would be produced as of allowing the Crown itself to be sued in tort, as the Government would have to reimburse the official concerned.

The prerogative of the Crown being the same in the colonies as in the United Kingdom, save where altered by statute, the Supreme Court of the Cape of Good Hope has decided that under Cape law the Crown cannot be sued in tort (*Binder* v. *Colonial Government*, 5 Supreme Court Reports, 284). The Supreme Court of the Transvaal has decided that this is also the law of the Transvaal, and that a head of a department cannot be sued for the torts of his subordinates (*Ruthven Bros.* v. *Collector of Customs*, 1903, Supreme Court Reports, 85). The same rule has also been laid down in the courts of Canada, Australia, and many of the Crown colonies. It was also the rule of the South African Republic (*Cullinan* v. *Reitz*, decided in June, 1899, in the High Court of the Republic), and is apparently still the law of France, Spain, and Germany. The practice of the British Government in South Africa bore out this rule. The Pretoria-Petersburg Railway Company had, by the tort of the South African Republic, been condemned before the war to pay the contractor for the line the sum of £125,000, and they claimed to be entitled to enforce repayment of this sum by the Republican Government, and they therefore asked His Majesty's Government to take over the liability on the annexation of the Transvaal. The request was steadily refused, but eventually, as they based their claim on contract, His Majesty's Government allowed it to be argued before the Transvaal Supreme Court, with the result that a compromise on equitable grounds was arrived at. But this was on the ground that the liability was at least capable of being considered contractual, and that, taking everything into account, the Company had some claim to equitable treatment. Even claims based on tort, which before the annexation Her Majesty's Government had pressed diplomatically upon the Government of the South African Republic, were held not to lie against His Majesty's Government—*e.g.*, the claim of Mr. Hess for the suppression of the *Critic* was pressed before the war, but after the war was held not to be legally binding on the Transvaal Government, and as the Transvaal Legislature was not prepared to vote anything for Mr. Hess he received no compensation. Similarly, His Majesty's Government recognised no liability for damage done to property by the Boers, whether the property belonged to British or Boers. Damage to property during war was most probably not a tort by Roman-Dutch law, but at any rate His Majesty's Government did nothing beyond allowing a part of the sum of £2,000,000 voted for the relief of British subjects, and of the sum of £3,000,000 allotted under the terms of peace to the ex-burgher to be granted in respect of damage to property, but, as mentioned above, both these grants were purely *ex gratia* and not in recognition of any

legal liability, and the amount of compensation awarded bore no substantial relation to the damage done.

On the same principles, it was held that the Transvaal Government had not succeeded to the rights of the South African Republic to sue in tort in the case of the Jameson incursion indemnity claim. When the Jameson raid took place His Majesty's Government gave a pledge that the British South Africa Company "should make amends for this outrage," and the Company actually did undertake to consent to the reference to arbitration of the question of the amount of indemnity to be paid by them, the terms of reference to be limited to an adjudication upon the material damages claimed as opposed to the moral and intellectual damages, and the expenses incurred properly attributable to Dr. Jameson's incursion as distinct from the disturbances in Johannesburg (*Parliamentary Paper*, C. 9343). This was clearly a case of a claim in tort by the Transvaal Government. On the 1st April, 1901, the Secretary of State for the Colonies was asked, in the House of Commons, what action would be taken against the Chartered Company in respect of the claim of the late Transvaal Government, and replied that "His Majesty's Government have taken legal opinion, and have been advised that the right to exact reparation for any damage caused to the South African Republic by the raid has not passed to His Majesty's Government as the result of the conquest and annexation of the state, and that there is no legal liability on the part of the Chartered Company to pay to His Majesty's Government, as representing the Government of the late South African Republic, any compensation in respect of the raid. In view of this opinion His Majesty's Government are not aware of any steps that can be taken by them in respect of the claim of the late Transvaal Government."

These examples show that to the exceptions to succession enumerated by Westlake (i., 78 *seq.*) must be added that of obligations in tort which he seems not to except. The fact is of great importance as supporting the theory here maintained of a singular succession. There is no difficulty, then, in understanding that liability for torts does not pass over to the successor, while at the same time it is easy to see why, though contractual obligations equally do not pass in law, it is more often expedient for a government to recognise contractual obligations than obligations *ex delicto*. In both instances His Majesty's Government have, in the case of South Africa, acted on the dictates of expediency.

CHAPTER IX.

STATE SUCCESSION IN RELATION TO PRIVATE RIGHTS.

THE general rule on either theory of state succession must be that the substitution of the new state makes no difference in existing private rights, and that any alterations in such rights are a matter for legislative action. Such rights include all rights *in rem* and all rights *in personam* where the person is other than the state, whether based on contract or on tort. On either theory the right to alter private rights by legislation is unlimited, unless specially restricted by treaty. In the case of cession such a right will naturally be used with more care than in the case of a conquest, and perhaps on the theory of universal succession emphasis is laid on the propriety of not altering these rights, while the theory of singular succession insists rather on the right to alter. The general rule follows logically from the nature of state succession; rights *in rem* exist indifferently with regard to all persons, and an alteration in the personality of the state makes no difference. Rights *in personam*, in regard to any person save the state itself, are equally clearly unaffected by the alteration in the state personality. Treaties frequently provide for the quiet enjoyment of the private property of individuals, but such stipulations are unnecessary, and treaties in this respect are declaratory of the common International Law. Similarly, all laws dealing with private, as opposed to public and administrative laws, remain in force until altered by the legislative action of the conqueror or cessionary.

For example, a Prussian Patent of 22nd May, 1815, regarding the incorporation of parts of Saxony, decrees that every one shall possess and enjoy his duly acquired private rights; the similar Patents of 13th September, 1865, for the annexation of Lauenburg, and of 3rd October, 1866, for the annexation of Hanover, Hesse, Nassau and Frankfurt, read: "We will protect every one in the possession and enjoyment of his duly acquired private rights," and the same words are used in the Patent of 12th January, 1867, for the incorporation of Schleswig-Holstein. Art. 17 of the Treaty of 1864, for the cession of the Duchies, explicitly provided that the new Government would respect every right legally acquired by individuals and civil persons.

The United States is peculiarly rich in judicial and other dicta on this head. The classical passage in the judgment of Marshall, C.J., in *U.S.* v. *Pertcheman* (7 Peters, 51); on p. 86 he says: "It may not be unworthy of mark that it is very unusual, even in cases of conquest, for the conqueror to do more than displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilised world would be outraged, if private property should be generally confiscated and private rights annulled. The people change their allegiance, their relation to their ancient sovereign is dissolved, but their relation to each other and their rights of property remain undisturbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new Government would have been unaffected by the change." Then later: "A cession of territory is not understood to be a cession of property belonging to

its inhabitants." The principles of this judgment have been repeatedly affirmed, and it has also been laid down that the laws, whether in writing or evidenced by usage and custom of the conquered or ceded territory, continue in force until altered by the new sovereign (*Strother* v. *Lucas*, 12 Peters, 410). The rule, of course, does not apply to mere inchoate rights, such as are of imperfect obligation, or mere expectations, as Huber (p. 59) calls them (*Dent* v. *Emmeger*, 14 Wallace, 398). This may seem to conflict with the statement in Halleck (ii., 505), that the new state is "bound to recognise and protect all private rights in land whether they are held under absolute grants or inchoate titles, for property in land includes every class of claim to real estate, from a mere inceptive grant to a complete, absolute and perfect title." But the practice of all countries excludes mere expectations, while an equity is really not an expectation but a real right. The fact is, that the legal system of the United States has frequently rendered equities fully secured under the original governments too insecure for safety under the successor. Hence, frequently, laws have had to be passed to secure the equities of the former owners, as Halleck (ii., 506) says: "Although the maintenance of such property may be fully guaranteed by the law of nations and the stipulations of treaties, yet, in order to place it under the careful guardianship of our municipal laws, it is necessary to invest it with a new attribute of a legal title, without which the owner may be unable either to maintain his own possession or to eject an intruder. For example, a right or title to lands, which under Spanish or Mexican law is abundantly sufficient for the security and protection of an owner in his rights, may be utterly useless for such purposes under our law, as it neither secures him in the possession and enjoyment of his property nor enables him to bring a suit to repel an aggressor." The same practice, according to Calvo (para. 2482), has been to some extent followed by France in Algeria, where the possession of the soil, regulated up to 1830 by the Koran, rested on no written titles, and had as its sole basis custom or oral traditions fortified by the oaths of witnesses. In the United States the rule has been applied to the cessions of Louisiana and Florida and the cessions of New Mexico and California. Mr. Bayard, in 1886, energetically protested against the claim by Chili to review titles already acquired in the territory which it had conquered from Peru on the basis of its own laws, on the ground that the claim "struck at that principle of historical municipal continuity of governments which is at the basis of International Law" (*see* Wharton, i., 12–18, and references). So, in the Treaty with Russia regarding Alaska (Art. 6), of 30th March, 1867, Russian private rights are guaranteed, and in Art. 8 of the Treaty with Spain of 10th December, 1898, regarding Cuba, Spanish private rights are expressly recognised, though native rights are left to the discretion of the United States. So the Russo-Japanese treaty of 1905.

The same rule has been adopted in English law and practice. In Calvin's case it was laid down (4 Coke, Part VII., p. 39): "If a King come to a christian Kingdom by conquest, seeing that he hath *vitæ et necis potestatem*, he may at his pleasure alter and change the laws of that Kingdom, but until he doth make an alteration of these laws the ancient laws of that Kingdom remain." In the case of an infidel country, the laws of that country would, *ipso facto*, be abrogated as against Christianity and the Law of God and Nature contained in the Decalogue. This view, as regards infidel countries, was soon given up, and the principle of legal continuity in all places was, in 1689, expressly laid down in *Blankard* v. *Galdy* (2 Salkeld, 411). Holt, C.J., held that Jamaica, being conquered, the laws of England did not take effect there until declared so by the conqueror or his successor. In 1722 (2 Peere Williams, 75) it is said that the Privy Council decided that on conquest the conqueror may impose such laws as he pleases, but the laws are not imposed by the mere fact of conquest. In *Hall* v. *Campbell* (1 Cowper, 204) Lord Mansfield said: "The laws of a conquered country continue in force until they are altered by the conqueror; the absurd exception as to pagans

mentioned in Calvin's case shows the universality and antiquity of the maxim; for that distinction could not exist before the Christian era, and in all probability arose from the mad enthusiasm of the Crusades." In this case he also laid down that "the articles of capitulation on which the country is surrendered, and the articles of peace by which it is ceded, are inviolable* according to their true intent and meaning." Such passages could be multiplied almost indefinitely (*see* Forsyth, *Cases and Opinions*, Chapter I.,; Halleck, ii., 493–503; Phillimore, iii., 863, 864; *compare also* the judgment in *Cook* v. *Sprigg* (1899, A.C. 572): "According to the well-understood rules of International Law a change of sovereignty by cession ought not to affect private property.") The continuance of the local law is also asserted by the Cape Supreme Court in *The Queen* v. *Jizwa* (4 *Cape Times* Reports, 380).

So in many treaties Great Britain has stipulated when ceding territory for the preservation of rights of former subjects. For example, in Art. 4 of the Bloemfontein Convention of 1854 the estates of all former British subjects are guaranteed; conversely by para. 2 of the Schedule to the Aliwal North Convention of 1869 are secured the titles of persons to whom lands had been granted in territory now ceded by the Orange Free State. By Art. 12 of the Pretoria Convention of 1881, and Art. 7 of the London Convention of 1884, all persons holding property in the Transvaal before the cession were continued in their rights, and by Art. 3 of the former Convention all laws in force at that time were to remain in force until altered by the Volksraad. By Art. 9 of the Anglo-German treaty of 1890, rights of property in the territories ceded by either power were to be respected, and the same rule was laid down for Heligoland in Art. 12 (4). By Art. 7 of the Anglo-French treaty of 8th April, 1904, it was provided that in the lands ceded by England native law and custom should, as far as possible, be respected. In cases of conquest also Great Britain has adopted this view, as in the case of territories ceded to her. Hence it comes that Roman-Dutch law is the private (*not* public) common law of the Cape, Natal, the Transvaal, the Orange River Colony, all Rhodesia south of the Zambesi, Ceylon and British Guiana, and that French law prevails in Mauritius, the Seychelles and the province of Quebec. In the case of the Transvaal in 1877, and again in 1900, all existing law, other than political, was continued in force, and authorised translations of the law of the Transvaal and Orange River Colony have been made and formally sanctioned by the Legislature. The amending legislation in these colonies since the annexation, though bulky, seldom relates to private law, and, where it has dealt with private law, has only been passed when it was certain that the change was desired by the people. It is, of course, inevitable that on conquest the conqueror should require to legislate to some extent in favour of his subjects who have suffered losses during the war at the hands of the conquered state. The chief examples of such legislation in the Transvaal are the refusal to recognise confiscations and alienations of property made by the late Government during the war (Proclamation No. 26 of 1901), and a provision in Proclamation No. 12 of 1901, that in all contracts entered into before the 11th October, 1899, giving rights to purchase farms or mining claims in which a fixed period was laid down for the exercise of the right, the period between that date and a period fixed by Government Notice No. 223 of 1902, at 1st June, 1902, and altered by Proclamation No. 37 of 1902, to 1st August, 1902, should not be counted.

It is obvious that it is impossible for the successor to re-open questions of private rights which have already been settled by the Courts of the previous

* This is treated as meaning that the Articles, *ipso facto*, form part of the colonial law by Baron Parke in *Cameron* v. *Kyte* (3 Knapp, 341), but must be considered in this sense of doubtful accuracy. The view of Lord Mansfield is supported in 1902, Mauritius Law Reports, 68 *seq.* (*Colonial Government* v. *Laborde and others*).

Government. As was said by Mr. Bayard in a despatch of 20th March, 1886 (Wharton, i., 17): "The rights of any person at the time of change must be measured and determined by the law under which he acquired them. The successor may alter the rights by legislative action; he cannot go back and, by applying his own law, decide judicially that a right could not arise." The doctrine is of great importance with regard to land grants. In many cases the successor may think that these grants were improvident, but he is only entitled to examine them to see if at the time when they were granted they were legal,* not if they were provident. Here we may distinguish between a concession and a land grant. A concession is a contract—a contract differing indeed in many respects from such an ordinary contract as one for the supply of stationery to Government departments, but still a contract. In many cases the Government receives a monetary payment; in other cases—*e.g.*, railway concessions—it may have to make payments, but the other party is bound to produce something for his concession. He must make or operate the railway, or manufacture dynamite, or supply gas, water or electricity, or maintain a market, or run trams, or distil whiskey, or manufacture leather, etc. The relation is essentially contractual and the form is frequently that of an ordinary contract (*see, e.g.*, the dynamite concession in the Transvaal, *Parliamentary Paper*, Cd. 623, p. 73). There are thus continuous obligations and rights on both sides, and, as the Government is one of the parties, alteration in the Government through change of state brings the concession to an end. Concessions, therefore, though frequently confused in treaties with private rights, differ from them essentially in nature, and have accordingly been considered in Chapter VIII. above.

It has, however, frequently been attempted to assimilate land grants to concessions, and to argue that as all land is held from the Government a conquering or cessionary state has some sort of right to re-open land questions. This view is, however, logically unsound. Of course, if there does exist between the Government and the landholder a mere contractual relation, then the same principles as in concessions apply. But if the land has been granted in freehold or in any similar tenure by the state the case is quite different. The right to land is one on any sound theory of jurisprudence valid against all the world, including the Government, and is not a quasi-contractual relation to Government. The idea that a Government normally owns the land of a country is a confusion between the fact that, for the purposes of International Law, a state must be held to own its territory and the facts of public and private law. A state is sovereign in public law over the territory, but it does not own the territory. It is true that in the Middle Ages, through a confusion of the idea of sovereignty and private property over land, the theory arose in English law that the King was feudal owner of all the land, but in the first place this maxim never belonged to public law proper, but only to private law, and in the second place it is now so obsolete as to form one of the most conspicuous blots in the English law of land tenure (*cf.* Hall, pp. 45, 46). The feudal system of land tenure was never introduced systematically into the British colonies except in the case of the earliest settlements,† and, normally, in the conquered or ceded colonies the British Crown is sovereign, but has no ownership of the land other than Crown land. For example, in the Transvaal the ordinary landowner does not hold his land under any fiction of a Crown grant. Nor is it

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* For examples of illegal grants *see Strachan* v. *Colonial Government* (4 *Cape Times* Reports, 405) and *White Brothers* v. *Colonial Government* (7 Supreme Court Reports, 187), both decided in the Cape Supreme Court.

† In places like Australia and New Zealand all the lands—other than those reserved to the natives—were the property of the Crown as waste lands, and were granted out by Crown grants. In all the colonies where English law is the common law, the King has the same rights as supreme landholder as in England, save where expressly diminished by legislation.

the practice in most European countries to consider the sovereign as the landowner. But even in such casesas in England, where there is a fiction that all land is held of the Crown in private law, it is impossible to consider that the relation is analogous to contract or concession. For the Crown has no right to the land save that of succession in the case of a failure of heirs on an intestacy, a right which, it may be remarked, does not require the support of the doctrine of holding land from the Crown, since it would follow immediately from the sovereignty of the Crown in public law, as it does in the case of those colonies where the feudal tenure does not exist.

All that can be considered in cases of land is whether the land was legally acquired under the laws in existence before the cession or conquest; the succeeding Government, clearly, is not obliged to recognise rights which were not legal under the law of his predecessor. As is said in the *United States* v. *Hanson* (16 Peters, 196), in the case of Florida the Spanish authorities had power to make grants of the public domain in Florida in accordance with their own ideas of the merits of the question, and the Court could only consider the question whether a grant was made in point of fact and what was its legal effect. American Courts have had frequently to consider such grants and to declare invalid grants made informally, or by authorities whose powers have expired, such as grants by the Spanish authorities of lands in Louisiana after the cession to France and before the cession to the United States (Wharton, i., 24), or, conversely, grants made by the French after the Treaty of Fontainebleu, unless the fact that the Spanish had not disturbed the grantees could be regarded as a confirmation of the grants. The best-known European case which bears on the point is that of the Elector of Hesse-Cassel's domains. One point in dispute here was whether Napoleon had a right to confiscate and make grants of the private property of the Elector, and that turned on the answer to the question whether the conquest had been real and there had been a state succession, and so the Elector had become an enemy whose property could be confiscated as that of a rebellious subject. The Elector declined to recognise alienations of the state domains made by the Emperor, and forbade the Supreme Court of Cassel granting redress. From the decision in the case of Count von Hahn (Chapter VII. above) it would appear that land grants made by the Emperor during the conquest should have been considered valid, but the Congress of Vienna would not interfere in the matter, though the Prussian representative expressed sympathy (Phillimore, Part XII., Chapter VI.; Hall, pp. 566–569).

An interesting colonial case is that of the Fiji land claims. By Art. 4 of King Cakobau's Act of Cession of 10th October, 1874, it was provided that "the absolute proprietorship of all lands not shown to be alienated so as to become *bonâ fide* the property of Europeans or other foreigners shall be and is hereby declared to be vested in Her Majesty, her heirs, and successors." Art. 7 declared that claims to titles of land should, in due course, be fully investigated and equitably adjusted. The Fijian law of land alienation was obscure and doubtful, and both Germans and Americans protested loudly against decisions of the Commission appointed under Ordinances No. 15 of 1875, No. 14 of 1877, and No. 25 of 1879 to decide on their claims; but the principle of the validity of the grants, so far as they were legally made by the Fijian chiefs before the annexation, was never controverted by His Majesty's Government (*Parliamentary Papers*, C. 3584 and 3815). A more recent case is that of a judgment in the Court of Appeal of East Africa in the cases of *Augusto Paolucci* v. *Commissioner for Mines of British Central Africa*, and the *British Central African Co.* v. *The Crown Prosecutor of the British Central Africa Protectorate* from a judgment of Judge Nunan of the British Central Africa Court. Put briefly, the facts were that certain land grants were given by chiefs in the Blantyre district to certain persons in 1889 and 1890; that in May, 1891, a Protectorate was declared over the territory of British Central Africa; that in December, 1891, these chiefs ceded

to Her Majesty all their sovereign rights, including all mineral and mining rights absolutely and without reserve; and that in 1892 the British Commissioner examined into the grants made before cession and gave certificates of title, including as a condition a royalty of 5 per cent. on the value of all minerals, mines, and precious stones. The question was: "What mineral rights the grants made in or about 1889 and 1890, and so confirmed, carried with them?" Judge Nunan decided that gold and silver mines were not granted by these grants, because it must be assumed that by the Proclamation of May, 1891, the Crown must be deemed to have received from the chiefs a grant of all the land in the Protectorate, and to have become the sole owner, and that those persons who, holding grants from the chiefs, came to the Crown for new grants must be deemed to have surrendered their rights to the Crown in exchange for regrants. The prerogative of the Crown regarding mines, therefore, applied to all grants, and the condition regarding a royalty must apply to base metals only, the Crown not having parted expressly with its rights to precious metals. The Court of Appeal thought that this fictitious regrant was not supported by any evidence, and argued that the rights acquired before the cession would have held good even after the cession, so that the grantees might have declined to accept Crown grants. The argument of Judge Nunan does appear to be quite invalid. It rests on a false view of the ownership of the Crown, and involves the impossible position that the proclamation of a Protectorate means the confiscation of all private property, and the judgment of the Court of Appeal appears sound from the point of view of International Law. On similar principles, confiscation made by preceding Governments cannot be re-opened by the successor, at any rate, provided they were carried out legally. So, after the conquest of Upper Burma, the Government declined to re-open cases of confiscations by King Thebaw as it appeared to have been within his legal power to make such confiscations. Nor, generally speaking, can the new Courts inquire into the acts of the old.

It should be noted here that English law does not satisfactorily secure the rights of private individuals as against action by the government, though it fully secures the rights of private individuals *inter se*. But if at, or shortly after, the conquest the British Government should, by an executive act, confiscate or appropriate property of its new subjects, it appears clear that no municipal court could grant relief on the ground that the conquest or cession was an act of state (*see* cases cited in Chapter III., especially *Elphinstone* v. *Bedreechund*). This is a point which may yet give rise to further legal decisions, for, while it is clear that the plea of act of state is a conclusive answer to any attempt to sue a successor on account of the action of its predecessor, it is not clear how far the Courts will go in permitting the act of state to bar cases in which redress is sought by a person, who has become a British subject, for executive action taken against him by a British Government on cession or annexation. It is also an established principle of English law that the Crown cannot plead an act of state as a bar to an action brought by a subject, so as to preclude the Court examining into the legal position of the case, and it will probably be held that for the Crown to be able to plead an act of state as a bar to a claim by a new subject, the act in question must have been done as part and parcel of the conquest or cession. For it would obviously be absurd, if years after the annexation of a country, the government should, by executive action, confiscate property, and attempt to bar an action for its restoration by the plea of an act of state.

It must be admitted that this is the point at which English law, by technical rules, prevents the carrying out in its courts of a principle of International Law, which is, at least, as certain as any International Law principle can be—viz., that a change of state does not justify the successor in appropriating the landed property of any of its new subjects. It cannot be doubted, in view of the cases

cited in Chapter III., that despite the treaty with the Fijian King in 1874, had His Majesty's Government appropriated thereupon any territory which belonged *bonâ fide* before the cession to a European, that European could not have sued His Majesty's Government in any British court, since the only ground on which the suit could be based would be the act of state, which, pleaded by His Majesty's Government, would have barred the suit (*cf.* Moore, *Act of State in English Law*, p. 80). The judgment in *Cook* v. *Sprigg* (1899, A.C. 572) expressly denies the binding force of even a treaty of cession, and it is impossible to limit its effect to cases of contract only. The same view appears to have been held in the Cape Supreme Court, *Cook Brothers* v. *Colonial Government* (5 *Cape Times* Reports, 107). On the other hand, *Sprigg* v. *Sigcau* (1897, A.C. 238) shows that the Privy Council, like the Court below, is not prepared to stretch this rule in the case of personal liberty.

CHAPTER X.

STATE SUCCESSION WITH REFERENCE TO LEASED TERRITORY, PROTECTORATES, ETC.

THERE is an exceptional set of cases, all creations of recent treaties, which, preserving the sovereignty of the ceding state over the ceded territory, yet places the administrative control of the ceded territory in the hands of the cessionary. In consequence of the inability of Turkey to carry out its administrative duties in Bosnia and Herzegovina, and in Cyprus, these territories have been assigned to Austria and England, respectively, to administer. For diplomatic reasons England has obtained from China leases of territory opposite Hong-Kong and Wei-Hai-Wei, while Russia (now Japan) has received a lease of Port Arthur and the surrounding territory, and Germany a lease of Kiao-Chow. These cases present anomalous features, and it is not yet possible fully to develop their effects. It may be added that Japan has secured a quasi-protectorate and certain administrative powers in Corea, but the details of the arrangements are still secret.

By the Treaty of 4th June, 1878, the Sultan consented to assign the Island of Cyprus to be occupied and administered by England. The annexe to the Treaty of 1st July, 1878, defined more precisely the conditions: (i.) a Mussalman religious tribunal was to continue to exist, and to deal with religious matters and no others; (ii.) the funds and lands of Mussalman mosques, cemeteries, schools, etc., were to be administered by a Mussalman nominated by the Board of Evkaf (Pious Foundations) in Turkey, and a delegate selected by the British authorities; (iii.) England was to pay to Turkey a sum equal to the excess of revenue over expenditure then existing in addition to the produce of Crown lands (the last stipulation was abandoned from 1st April, 1879, in exchange for £5,000 a year by an agreement of 3rd February, 1879); (iv.) the Sultan was to be able to deal freely with his private lands; (v.) the English Government, through its competent authorities, could purchase compulsorily, at a fair price, land required for public purposes and land not cultivated. A supplement of 14th August, 1878, conferred on Her Majesty for the term of the occupation full powers for making laws and conventions for the government of the island in Her Majesty's name, and for the regulation of its commercial and consular relations and affairs free from the control of the Porte (*see Parliamentary Papers*, C. 2057, 2090, 2138). In the case of Wei-Hai-Wei, a convention was signed on 1st July, 1898, at Pekin, leasing the territory to England in order to provide her with a suitable naval harbour in North China, and for the better protection of commerce in the neighbouring seas. The area leased is about 285 square miles, including the Island of Liukung, and Great Britain has also the right to erect fortifications, station troops, and take other measures necessary for defensive purposes on certain parts of the coast East of 120° 40′, and to acquire on equitable compensation within that limit such sites as may be necessary for war preparations, communications and hospitals. In the leased territory Great Britain is not to expel the inhabitants, but it can expropriate them from land required for public purposes on the payment of equitable compensation (*Parliamentary Papers*, C. 9081 and 9131).

In order to secure Hong-Kong immunity from attack by land, in view of the increased range of modern artillery, a treaty was signed on 9th June, 1898, for the extension of Hong-Kong by lease of part of the province of Kwang-Tung for 99 years. It was then stipulated that in Kowloon city Chinese officials should execute jurisdiction, save in so far as military exigencies forbade, but that in the rest of the ceded territory the British authority should have sole jurisdiction. But, as the

exemption of Kowloon did not prove satisfactory, British jurisdiction was, in 1899, extended to it by convention. It was expressly stipulated in the treaty that natives were not to be expelled or expropriated, save in so far as land required for public purposes might be purchased at equitable rates (*Parliamentary Papers*, C. 9087 and 9131).

In case of Cyprus no term was set for the duration of the assignment as the island is held against any attempt, at any future time, by Russia to seize further territories of the Sultan of Turkey (Westlake, i., 138, n.), though under the supplementary convention of 1st July, 1878 (Art. 6), it is to be evacuated should Russia ever restore Kars and her other Armenian conquests. In case of Wei-Hai-Wei the lease will apparently last so long as the territory of Port Arthur remains out of Chinese hands. The Russian lease has been ceded now to Japan, and the British Government appears to regard the tenure of Wei-Hai-Wei as being co-extensive with the tenure of Port Arthur by the Japanese. In the case of Kowloon, the lease is for 99 years certain.

In the case of Bosnia and Herzegovina, the Treaty of Berlin, 1878 (Art. 25) provided that these provinces should be occupied and administered by Austria, subject to further arrangements as to the Sandjak of Novi Bazar. The question of the Sandjak was roughly regulated in the Treaty of 21st April, 1879, which also laid down various stipulations regarding the treatment of the provinces. The preamble states that the fact of the occupation of the provinces does not impair the Sultan's sovereignty over them. Art. 1 provides that the administration of the provinces will be exercised by Austria-Hungary in conformity with Art. 25 of the Treaty of Berlin, but that the Government has no objection to retaining the services of such officers as possess the necessary qualifications for employment. Art. 2 provides that the name of the Sultan should continue to be pronounced in the public prayers of the Mussalman inhabitants and the Turkish flag should be used on the minarets. Art. 3 provides for the devotion of the revenues of the provinces entirely to their needs, their administration and amelioration. The case of the inhabitants of the provinces not living within them is left by Art. 6 for further consideration, and permission was given to the Turkish Government to dispose of the military stores belonging to it and lying in its fortresses.

The case of the German occupation of Kiao-Chau is similar to that of Wei-Hai-Wei, but is for 99 years certain. Land can be expropriated on fair payment, and, as a matter of fact, the territory is quite as independent of Chinese rule as is Wei-Hai-Wei. The official German view is that the Chinese Government transferred by the lease all its sovereign rights for the period of the lease (*see Parliamentary Paper*, C. 9131, pp. 69, 70; Westlake, i., 134, n.). In the case of the lease of Port Arthur and Talienwan full powers were considered to have been ceded to the Russian Government, the Russian official view being that the territory was ceded in usufruct (*see Parliamentary Paper*, C. 9131, pp. 1 *seq.*). The position of the French lease in China is similar to that of Port Arthur.

The case of Crete is yet more anomalous. Since 1898 it has been governed by a High Commissioner with an elective legislature containing some nominated members. The High Commissioner, who is appointed by Great Britain, France, Italy and Russia, is required to establish an autonomous administration, while recognising the sovereign rights of the Sultan.

The exact legal position of these territories has been a source of much dispute. It must, however, be said that it does not appear possible to distinguish the cases of lease from cases of occupation and administration. They differ, if at all, merely in the degree of accuracy with which the duration of the relation is defined.

The view which appears to me to work in practice is that the lease or occupation is really a cession in full sovereignty, retaining for the ceding power

a mere *nudum jus* of sovereignty—nothing indeed but a name *plus* any rights expressly reserved by treaty stipulation. Of course it is impossible to expect these anomalous cases to show any simple theory, but most of the facts can best be fitted into the view proposed above. The matter has been discussed in the case of the agreement of 1894 for the lease to Great Britain, by the Congo Free State, of a strip of territory 25 kilomètres in breadth, extending from Lake Tanganyika to Lake Albert Edward, to be subject to British administration so long as the Congo remained subject to the King of the Belgians. The German Government protested against this on the ground that such a lease was equivalent to a cession, and would deteriorate her political position in Africa. The agreement was accordingly rescinded. Hall (p. 90, n.), in discussing the matter, says: "Although a lease for an indefinite time may, in certain aspects, be the equivalent of a cession, in law it is not so. A state may be able to make a cession of territory free from its own obligations, but in granting a lease it cannot give wider powers than it possesses itself, and consequently, altogether apart from the Treaty of Germany, the Congo State could not disengage territory from neutral obligations by letting it out upon a subordinate title."

I am bound to say that there seems no real authority for this theory of the difference between the effects of cession and of an indefinite lease, and it is noteworthy that this point was not taken by the British Government. The fact of the retention of the sovereignty by the leasing state is probably the theoretic basis on which it rests, but that sovereignty could only make a difference if in some sense it were real. A mere shadow of a name, even with a possibility of a reverter, is not adequate to support Hall's proposition. As will be seen later, the British Government have treated the capitulations as non-existent in Cyprus, and have even regarded the people of Kowloon as British subjects, though in neither case is the lease for ever. The position is no doubt anomalous, but no useful purpose is served by giving up the problem as Holtzendorff (ii., para. 51) does. If we regard such leases as practically cessions we shall have a working basis for the treatment of the cases which we will now consider in detail.

(i.) With regard to treaty obligations, on this view the treaties of the old state will be held to have fallen to the ground and the treaties of the new state to apply. This is certainly true of British practice. Kiatibian (p. 122) and Huber (p. 131) maintain that the occupant takes all international obligations over as they stand at the time of taking possession, and can only alter them in the same manner as the nominal sovereign could have done. It is very awkward for the truth of this theory that the English in Cyprus have never admitted it. An Ordinance of 17th January, 1879, established a new set of Courts in the island, and the act was notified to the powers. Huber regards this act of notification as a notification of the cessation of the capitulations which, not being protested against by the powers, was accepted by them, there being no ground for their insisting on their rights when a European system of justice was in force. There is no evidence whatever to show that Great Britain in any way considered itself bound by the capitulations. The cession gave it full legislative and judicial powers, and released the island from the capitulations. It exercised its legislative powers, and notified to foreign states that it had done so as a simple act of courtesy. I am not aware of any case in which Great Britain has recognised the treaties of the leasing power as binding the territories leased. In the case of Bosnia and Herzegovina, Kiatibian (p. 135) quotes two Circulars of 16th June and 26th December, 1879, as recognising that the capitulations are in force, but though Austria seems to have tolerated them for a time she has since got rid of them all, and established new Courts independent of the capitulations, without obtaining the consent of any other powers, unless we are to construe into assent the tacit acquiescence of those powers which may with equal propriety be regarded as acquiescence in undoubted rights. Further, a law of 20th December, 1879,

included the two provinces in the Austrian Customs Union, and subtracted them from their old customs relations with Turkey, yet no power protested against this. It will be remembered that in real cases of cession the capitulations likewise disappeared in Greece, in the Russian provinces of Turkey, and in Algiers.

With regard to the application of the treaties of the occupying state to the leased territory, it may be noted that even Kiatibian (p. 135, n. 1) assumes that these pass over *ipso jure*. Huber (p. 132) objects that the consent of the other party is required, as the occupier has not full rights of sovereignty, and so cannot fulfil all obligations imposed upon him by the treaty, as a matter of course, in the leased territory. The argument is not of great weight, as it begs the question of an occupier's right of sovereignty. As a matter of fact, England has apparently held that all treaties of general application apply to Kowloon, along with Hong Kong, and Austria, in a commercial treaty with Servia in 1881, declared the treaty to be applicable to all countries in the Austrian Customs Union, which, as we have seen, includes the occupied provinces. It is true that in a case of the application of this treaty the Court of Cassation at Belgrade condemned the inclusion of the provinces in the treaty, but it did not venture to overrule the treaty as confirmed by the Legislature, and the principle was formally reaffirmed in the renewed treaty of 1892 (Westlake, i., 136). The view taken by the Belgrade Court seems to be unsound, and may be classed with that of the Tunis Court of 20th January, 1890, which held that the capitulations are still in force in Cyprus (Huber, p. 265).

Holtzendorff (ii., para. 51) is of opinion that the Austrian Government had no right to override the capitulations, and this view is shared by Martens (i., 362 *seq.*) and by Kiatibian and Huber. Bluntschli and Westlake incline to regard the rights of Austria as those of practical, though not of nominal, sovereignty, and therefore do not insist on the binding character of the capitulations. Martens, indeed, argues that only Turkey could conclude a treaty regarding the legal position of Bosnians and Herzegovinans in foreign countries, a view undoubtedly hard to reconcile with Art. 6 of the Agreement of 21st April, 1879, which left the question open, and one which is rejected both by Kiatibian (p. 126) and by Huber (p. 132), on the obvious ground that the Sultan has abandoned his power of deciding anything for the ceded provinces. In the case of Crete the evidence seems similarly to show that it is no longer bound by Turkish treaties, and can contract for herself.

(ii.) With regard to the administrative and legislative powers of the state there is little difference of opinion. The British Government has systematically exercised all powers of legislation and administration. The Government of Cyprus is, by Order in Council of 14th September, 1878, amended by Order in Council of 30th November, 1882, entrusted to a High Commissioner who wields the executive authority, and a legislative council with a majority of elected members, power being reserved, however, to legislate by Order in Council. (*Parliamentary Papers*, C. 3211 and 3791.) The administration of justice is provided for by an Order in Council of 30th November, 1882, which establishes a Supreme Court, six Assize Courts with unlimited criminal jurisdiction, six District Courts with limited criminal and unlimited civil jurisdictions, six Magistrates' Courts for petty cases, and many village courts, and in practically all matters Cyprus is treated like a colony, and is administered by the Colonial Office. By an Order in Council of 24th July, 1901, a Commissioner for Wei-Hai-Wei is constituted, with full legislative and executive powers, and a High Court exercises civil and criminal jurisdiction. The territory of Kowloon is treated as a part of the colony of Hong-Kong, subject in executive and legislative matters to the Governor and Legislative Council of Hong-Kong, and in judicial matters to the High Court of that colony. In Bosnia and Herzegovina the Austrian Government has freely legislated, and has exercised full executive and judicial powers. The same remark applies to Russia (now Japan) in Port Arthur and Talienwan,

and to Germany in Kiao-Chau. In Crete the new Government exercises full legislative, administrative and judicial powers. The nominal nature of the sovereignty still conceded to Turkey can be seen from the fact that Austria has introduced military service into the provinces. This is fatal to the theory of Martens, Holtzendorff, and Kiatibian, that she merely administers. A state which has full legislative and judicial authority must have power to exercise military authority, although it could not well use its new soldiers to fight against the nominal sovereign. Huber (p. 133), Bluntschli and Westlake fully admit the right. What is more important is that the British Imperial Parliament recognised it to the extent of amending the Army Act so as to permit of the raising of a force in Cyprus for service outside the island. So a Chinese regiment was raised in Wei-Hai-Wei, the Germans are considering the raising of Chinese troops in Kiao-Chau, Russia raised forces in its leased territories, and Crete has, of course, a militia.

(iii.) The nominal sovereignty has one effect—that of preventing a change in the nationality of the inhabitants. In Bosnia and Herzegovina the nationals remain Turks, and can only be naturalised if they establish a domicile in Austrian territory. Similarly the inhabitants of Cyprus and of Crete are still Turkish subjects. The Cypriote abroad is not entitled to be protected as a British subject or even as the subject of a British protectorate (*cf.* Hall, *Foreign Jurisdiction of the British Crown*, p. 226). This is not, however, the case in the leased territories of Kowloon, where the inhabitants are considered British subjects by cession, and where, presumably on the expiration of the lease, they will become Chinese by re-annexation to China. This case goes very far to assimilate to a cession a lease of territory, and I am inclined to think that it represents the doctrine which will eventually prevail in all cases, even where only a right to administer is granted and the nominal territorial sovereignty is reserved.

(iv.) With regard to state rights and obligations as to property, the treaties define the extent of the rights ceded in general terms. Everything not expressly reserved to the ceding state goes over to the cessionary. Expediency probably requires that the cessionary should recognise contractual obligations binding on the ceding state, but there can be no legal obligation to do so independently of treaties, and it is obvious that neither expediency nor law would require the recognition of claims founded on tort. But I have been unable to find any reported case bearing definitely on the matter.

(v.) Private rights are always respected just as in ordinary cases of cession, and, of course, they are subject to the ordinary sovereign right to expropriate for public purposes on payment of compensation. The conventions as to Wei-Hai-Wei, Kowloon and Cyprus contain special clauses as to this. The power was freely exercised in Cyprus (*see House of Commons Paper*, 277, 1890–1891).

The question is sometimes raised as to the exact status of these territories in case of war. If England were at war it is argued that the island of Cyprus might be an enemy so far as England was concerned, and a neutral as regards Turkey, and *vice versâ*. Similarly, with Bosnia and Herzogovina (*cf.* Hall, p. 510). There can hardly, however, be any real doubt as to the case. If England were at war her enemy could treat Cyprus as if it were part of English territory and seize Cypriot ships. If Turkey were at war England would never permit Cypriot ships to be seized, although they fly the Turkish flag, or permit Cyprus to be invaded. It is similar with Bosnia and Herzogovina, and there can be still less question in the cases of Crete, Kowloon, Wei-Hai-Wei, and Kiao-Chau, in all of which Turkey or China possesses a nominal sovereignty. This view is supported by the case of Trieste, in 1848, which Sardinia treated as hostile territory as used by Austria, while the German Confederation claimed it as neutral. As Hall says (p. 512), the claim of the Confederation was inadmissible, and would lead to absurd results. Occupation is, indeed, sufficient

to prove that a territory is hostile (Hall, p. 508), as has been seen recently in the case of the *Varlag* and *Korietz*, in the Korean harbour of Chemulpho. The captains of the foreign war vessels in the port protested against their capture by Japan as a violation of Korean neutrality, but their protests were not taken up by their Governments, which evidently recognised that the circumstances of the case amounted to a Russian occupation of Korean territory (*cf.* Lawrence, *International Law in the Russo-Japanese War*). So, of course, the territory at Port Arthur was simply considered as purely Russian territory, and, in cases of wars abroad, warnings against violating British neutrality are published in Cyprus, Kowloon, and Wei-Hai-Wei.

Cases of leases and occupation may be compared with cases of colonial protectorates in the correct sense of that term (Hall, pp. 125–129; Westlake, i., 109 *seq.*). In these cases the whole power is vested in the protector, subject only to the treaty of protection. The protectorate is not an international person, and the same rules apply to it as apply to territory formally annexed as a colony. There is no reason from the point of view of International Law to treat such protectorates in any manner different from colonies, nor in the case of England is there any reason of public law why her colonial protectorates should not be converted into colonies. She now exercises full legislative, executive and judicial power, either directly or through the British South African Company, in the West African, South African and East African Protectorates. German protectorates differ merely in name from colonies, and France in her treaties with Annam and Cambodia has secured herself full legislative and judicial powers (Hall, *Foreign Power and Jurisdiction*, p. 209). From the point of view of International Law the treatment of these protectorates is precisely the same as the treatment of ceded or conquered colonies, and the rules above developed apply to them.

On the other hand, there are cases of real protectorates, as opposed to colonial protectorates, which present special features. Such was the protectorate of Great Britain over the Ionian Islands from 1815 to 1863, the protectorate over Tunis by France, over Madagascar by France till 1895, and over Zanzibar by Great Britain. Huber discusses (pp. 170, 171) the cases of Tunis and Madagascar under the head of "Colonial Protectorates," which is, however, merely a case of inconvenient nomenclature. In all instances the protector had nominally no internal sovereignty, but merely managed external relations. The case of the Ionian Islands was regulated by treaty between England, Austria, Prussia, and Russia of 4th November, 1815. Great Britain could only bind the islands by her treaties if she so expressly stipulated, and in the Crimean War the Islands remained neutral (*The Ionian Ships*, 2 Spinks, 212), because Great Britain had not declared war for them. The Islands could themselves make no treaties and accredit no ministers or consuls. In the case of Tunis the Treaty of Casr Saïd of 12th May, 1881, bound the French Government to execute all existing treaties. In the case of Madagascar the Treaty of 17th December, 1885, confirmed the Queen in the administration of the island, subject to the representation of the island in foreign affairs by the French and the protection by France of its subjects in foreign lands. Nothing was stipulated as to treaties, but they were regarded as remaining untouched (Kiatibian p. 33). This is fully recognised by Rivier (ii., 142), Huber, and Pradier-Fodéré (ii., 931). In the case of Zanzibar Great Britain recognised all treaties, and long negotiated with Germany and France for the surrender of their extra-territorial rights in that country. Hanotaux (*L'Affaire de Madagascar*, p. 284) maintains that such treaties disappear, but it is fatal to the truth of his theory that the Ministry of 1895, of which he was a member, decided to annex Madagascar to rid themselves of treaty obligations.

The annexation of 1895 is, indeed, of great importance as confirming the theory of singular succession. On the theory of universal succession the treaties must have subsisted, but, as a matter of fact, even Great Britain did not dispute the fact that

the treaty of commerce with Madagascar had fallen to the ground. It is no doubt not quite accurate to say, as Westlake (i., 60) does, that England admitted without difficulty that she could no longer claim the benefit of the Malagasy tariff. But (*ibid.*, p. 351) it is true that Lord Salisbury's arguments (*State Papers*, 1898 ; *Parliamentary Paper*, France No. 1, 1899) were not based on any idea that the treaty could survive the annexation, but on assurances given to the British Government that the object of the French expedition was to maintain the French protectorate. The correspondence contains no hint that the treaty could be claimed as legally binding after the annexation ; the argument was that the French Government had no right to annex, and, having done so, was bound to safeguard the English rights. Eventually the claim, which the French Government never accepted, was surrendered by a declaration annexed to the Treaty of 8th April, 1904, in return for certain concessions in connection with French postal and extra-territorial rights in Zanzibar, which, as mentioned above, England had recognised as binding on her, despite her declaration of a protectorate over Zanzibar.

So in the case of Egypt, despite the British protectorate, the old capitulations have always been regarded as being in force, and Great Britain has never attempted to denounce them as unsuited to the modern circumstances of the country, although in the opinion of Mr. E. Dicey, among many others, she had ample justification for doing so. Japan has similarly undertaken to maintain Korean treaties.

Somewhat different is the position of a state which, like Bulgaria, is on the way to free itself from the control of its mother state. Servia and Roumania have, through treaties made on their behalf, become sovereign states, and Bulgaria has this end in view. It now occupies a position analogous to that occupied by those states in the period between the Crimean War and 1877. The two states then possessed full internal independence, but were bound by treaties of Turkey so far as these did not conflict with rights secured to them by treaty, and they could not negotiate treaties direct with foreign powers (*cf.* Firman of Prince Charles of Roumania of 23rd October, 1866). So in the Treaty of Berlin of 13th July, 1878, all treaties of commerce and navigation, and all other treaties between Turkey and foreign powers, are maintained in force, and cannot be altered without the consent of Turkey. The capitulations were to remain in full force, a provision which similarly applied to Roumania and Servia before the Treaty of 1878 (Kiatibian, pp. 110 *seq.*). So Turkey alone has still the right to make treaties, at least those of any importance, for Bulgaria, and it is doubtful whether Bulgaria will be as fortunate as Roumania in her efforts to emancipate herself from the supervision of Turkey (*cf.* Holland, *Studies*, p. 153). So in fiscal matters the state of Bulgaria is substituted for the Porte in its obligations regarding the Rustchuk Varna Railway, which, however, it has hitherto avoided fulfilling, and in its railway obligations towards Austria, part of which it has carried out. Bulgaria should also pay part of the Ottoman debt, but it has hitherto not done so, and it pays no tribute. There can be no doubt that in the event of Turkey going to war it would be impossible for Bulgaria to claim to be treated as neutral, though when Bulgaria was attacked in 1886 the Porte did nothing to help its vassal. When travelling abroad the Prince usually travels *incognito*, to avoid the necessity of calling as an Ottoman subject on the Turkish Ambassador in the capitals which he visits. He has, however, established his right to correspond with the Foreign Office at Constantinople and not with the Bureau for the Privileged Provinces.

CHAPTER XI.

STATE SUCCESSION IN THE CASE OF THE ENTRY OF A STATE INTO A FEDERATION.

In the case of federation there is always some degree in which the personality of the parts concerned continues to exist, despite the federation. If the federation is one of states, or *Staatenbund*, then the sole result of the union is to create a central authority, which has many of the executive powers of the uniting state for external purposes. Such was the case with the German Confederation between 1820 and 1866, where the parties had not lost the power of making treaties, but were only restrained in its exercise in certain definite respects. Under the constitution of the federation the several states guaranteed each other's possessions, and undertook not to war against each other. A Diet was formed which could receive and accredit envoys, could conclude treaties on behalf of the Confederation, and declare war against foreign states if the territory of the Confederacy were threatened. The several states, however, retained the right of receiving and accrediting ministers, of making treaties, and of forming any alliance not prejudicial to the Confederation, and if a majority of the Diet should decide that an alleged case of hostile attack did not constitute a common danger, the minority could take measures of self-defence. There was no common German nationality and no common military force. The only means of constraining recalcitrant states to adhere to the Confederacy was the use of the military forces of the other states, which use could not be made without their consent (Hall, p. 27).

In the new German Empire, however, while some vestiges of external relations of states remain, and so the union may be called a *Staatenbund* (Westlake, i., 36), yet the actual state of affairs is really a federation proper (Hall, p. 23, n.; Huber, p. 165; Bluntschli, para. 70, who points out its anomalous character). The confederate element mainly consists of the right of certain states, of which Würtemburg, Bavaria, and Saxony are the chief, to receive foreign ministers, who have little or no work to do, and to accredit ministers to deal with matters not reserved for the Imperial Government. All Germans have one nationality, and the Imperial Government controls the diplomatic relations of the corporate state, and has sole power of concluding treaties of peace or alliance, or treaties of any kind for political objects, commercial treaties, treaties regarding domicile, emigration, postal or copyright matters, extradition, etc. Further, there is a common command in time of war.

The United States of America is a federation in which, for international purposes, the separate existence of each state is now fully merged. Westlake prefers to call the constitution of the United States the case of an incorporation instead of a federal union, chiefly, it would appear, on the ground that no state of the union can secede from it. The question is mainly one of terminology, but it may prevent confusion to dwell on it for a little. The most satisfactory terminology seems to be to use the term (i.) incorporate union to mean a union such as that of England, Scotland and Ireland since 1801, where all parts of the United Kingdom, besides being under one legislature, have no existence as states of International Law; (ii.) a federal union is the correct description of a state like the United States of America or the Argentine Republic, where the separate members are in themselves distinct in legislative and executive action, but in which there is a central legislative and executive power, which alone represents the Federation for foreign purposes; (iii.) a confederacy denotes a confederation like

the German Confederation from 1820 to 1866, when the individual states are still states of International Law, though restricted in their action by the Confederation. The present German Confederacy since 1871 is, on the whole, a federal union with slight traces of its old confederate nature. It may be objected to Westlake's terminology that by using "incorporate" of the United States it leaves "federal" without any very clear meaning, and leaves no room for the distinction between such really disparate cases as those of the relation of the United States of America and of England, Scotland and Ireland; (iv.) the term "real union," though not felicitous, appears consecrated by usage to the description of such cases as those of Norway and Sweden before 1905 and of Austria and Hungary since 1867. Huber (p. 164), following Jellinek, argues that real unions are merely cases of particularly closely united confederations. On the other hand, Hall's view is that from the point of view of International Law there is no distinction between real and federal unions, and Westlake (i., 35) argues that the only difference between federal and real unions is that the former, being based on a treaty, or being based on the analogy of a treaty, permit of and, indeed, tend to produce a certain merger of internal distinctness, which could not arise from the mere descent of different crowns upon one head, even when the permanence of the union of the crowns is secured, as it was in England and Scotland between 1603 and 1707. The view of Huber appears to be untenable. The essence of a confederation is that the component parts should remain to some extent persons of International Law, which is certainly not the case in a real union such as that of Norway and Sweden, where neither separately had any personality whatever in the eyes of International Law. The view of Hall, as modified by Westlake, appears clearly sound. The real union and the federal union are, for International Law purposes, one, though from the point of view of public law they differ in the respect indicated by Westlake, for it is undeniable that the United States have much of their internal distinctness merged through federal legislation, whereas Norway and Sweden had no common legislature at all, and Austria and Hungary only the delegations. Incorporate unions must be classed as distinct from real and federal unions, from the point of view of International Law, and the distinction to be drawn is, therefore, that between (i.) Confederations and (ii.) Federations, including under the latter term real unions, and (iii.) Incorporate Unions, which are treated as simple states.

(*a*) The first important question which arises is: What happens to the treaties of a state entering a confederation or a federation? It is a question which may attain considerable importance if either Cuba joins the United States, or if Holland joins the German Confederation—a possible, though not probable contingency. The answer must be, it is submitted, that all treaties lose their force in so far as the state loses its international personality. Even in the case of a confederation, any treaties inconsistent with the alliance must be considered to be broken by the entrance of the state into the confederation. The breaking of the treaty may be a cause of war; but the treaty itself cannot be maintained. Huber (p. 164), following Kiatibian (p. 77), lays down that, for a confederate state there is no alteration introduced by entering into the confederation, save in so far as treaties between the confederating parties themselves are concerned. Treaties which are inconsistent with the treaty of a confederation must be denounced in the usual manner. On the other hand, Hall (p. 358) expressly says: "If a state becomes subordinated to another state, or enters into a confederation, of which the constitution is inconsistent with liberty of action as to matters touched by the treaty, it is not bound to endeavour to carry out a previous agreement in defiance of the duties consequent on its newly formed relations." The reason he gives is that the state will not join a confederation, save for some vital need, which characteristic removes the treaty of federation from the operation of the general rule that treaties rank in order of date.

In the case of federation, Huber (p. 166) says that these separate states of a federal union (*Bundestaat*) remain, doubtless, international persons, bearers of international rights and duties, though such rights and duties are limited by the union. This is hardly, however, an accurate description of the greater number of the German States which have no rights of legation, and it is certainly not a correct description of the United States or of the Argentine Republic. Huber, indeed, seems throughout to over-estimate the position of a state in a federation, an over-estimation not unnatural when it is remembered that the German Confederation of 1820 to 1866 did leave its members states of International Law, and that traces of this fact remain even in the present German Confederation. But, in the case of a federation, it is impossible to maintain that the states are states of International Law. Doubtless before the federation they may be such states, though they are not necessarily so, for many of the newer states of the American Federation are, historically, merely provinces created as states on the anology of the original thirteen states. But by the federation they lose their international position, and, as Westlake says, they would not be considered as having a right to separate, or if they did separate, as resuming their international existence as a continuous possession, merely limited by treaty for the period of the federation. The state formed by the separation would be considered a new state, as is shown by the fact that foreign powers refused to recognise the seceding states of the United States in 1861 to 1865. They were only entitled to do so if, from the point of view of International Law, the seceding states had no international existence. Similarly the European powers declined to recognise the freedom of Hungary, in 1849, on the ground that Hungary was not a state of International Law, a real union being, as we have seen above, for international purposes, similar to a federal union. On the other hand, it is probable that on the break-up of a confederation proper it would be necessary to recognise that the several states were resuming their full position as sovereign international states, free from the restrictions of the confederation.

It is significant that Huber admits that (i.) all treaties of alliance and guarantee fall to the ground ; (ii.) all treaties affecting matters within the competence of the confederation disappear as soon as the federation exercises its power. This has been decided by the Imperial Court of Germany in a criminal case (Decisions, 4, 274), which also in a civil case (Decisions, 24, 13) laid it down that, if not expressly altered by the federation a treaty remained unaltered. This case was one in which it was decided that a treaty between Saxony and Austria concerning bankruptcy remained in force, in view of the fact that no legislation of the empire had yet dealt with the question. But this merely illustrates the fact that, in some respects, the existing German Confederation retains its confederate nature, and it cannot be quoted as applicable to the case of a federation pure and simple. Further, Huber admits that the only remedy of a third party aggrieved through the disappearance of a treaty with a state which enters a federation is for it to decline to recognise the federation, and that, if it does not do so, it recognises that entrance into the federation can alter the effect of a treaty. Moreover, Huber lays down (p. 167) that the whole burden of rights and duties, as far as federal matters are concerned, passes over to a federation on its formation, and adds (p. 16) that the separate states preserve all their international rights and duties so far as they are not removed by the federation, in which case no denunciation of treaties is necessary, as they fall without such denunciation. One may fairly claim that this amounts to an admission that treaties disappear, except in so far as the nature of the union permits the state to maintain an international position, so that in the case of a federation proper all treaties disappear—in the case of a confederation those inconsistent with its terms.

Rivier (ii., 142) has a *dictum* which amounts to the same thing: "In cases of real, confederate or federal union, treaties only lose force if, by the union, they have

lost their object or use or are opposed to the constitution or federal agreement. Those remaining may be denounced on either side owing to the change of circumstances." On this theory if a state joins a federation, the constitution of which, like that of the United States, forbids its members to have treaties with other powers, all treaties disappear; if it joins one like the German Empire, all treaties disappear which are inconsistent with the constitution of the empire, though, of course, where the empire is only empowered to make treaties on the question, existing treaties persist until such power is exercised, which fact illustrates in a striking manner the confederate nature which still manifests itself in the German Union.

Holtzendorff (*Encyclopädie*, p. 1289) lays it down that in the case of a free union of formerly sovereign states into a federation, the treaties remain to be carried out by the federation, on the ground that a state can undertake obligations to foreign states with regard to a part only of its territories. Such treaties, however, fall to the ground which are incompatible with the general purpose—*e.g.*, treaties of alliance of certain members of the federation with foreign states. This view is ingenious, but it does not appear to be supported by practice in the case of a federation, and it is not necessary to explain the recognition given by the Imperial German Court to the treaties between Austria and Saxony regarding bankruptcy.

Hall's view is that it is only in matters not covered by the treaty of federation that the "state retains its normal legal position" as an international state, which coincides with the view here put forward. Kiatibian (p. 170) holds that since the confederation of Germany, in 1871, the international conventions of the several states still bind them. Most of these, he says, have been replaced by Prussian treaties, but it required for that purpose a formal agreement with foreign powers. This is true, subject to the observation that the treaties which persisted, despite the confederation, were not those which were contrary to the federal constitution, but those which dealt with matters with which the constitution empowered the federal Government to deal, but with which it had not dealt. The remarks of Pradier-Fodéré (i., 278), who says that "confederate states must fulfil their prior obligations," may be justified in the same manner.

In diplomatic practice it may be noted that England and France (*see* Lawrence, Note 20 to Wheaton, Book I., Chapter XI., para. 2) protested against the theory that the union of Texas with the United States would cancel existing treaties, and held that "the stipulations would remain in precisely the same situation as if Texas had remained an independent power." But, as Westlake (i., 60) points out, the objection was not pressed, and he suggests that it may have been based on the failure of the powers to recognise a true incorporation through the veil of a quasi-federal union. That criticism, which in the terminology adopted above would read "a true federal union, through the veil of a quasi-confederate union," evidently rests on the principle here maintained. This view was clearly held by Mr. Fish, Secretary of State of the United States, who, in a note to Aristarchi Bey, of 18th September, 1876 (Wharton, i., 24), says: "The union between the United States and Texas, to which you refer, was effected by the legislation of the parties. It necessarily cancelled the treaties between Texas and foreign powers, so far, at least, as those treaties were inconsistent with the constitution of this country, which requires customs duties to be uniform throughout the United States."

The view appears, therefore, sound, that so far as a real cession of sovereignty takes place on the part of the federating state, so far do its international character and treaty obligations disappear, just as is the case on cession or annexation. Cases of union differ from cases of cession only so far as the union is incomplete, as in the case of a confederation, and does not completely merge the personality of the state. The difference in treatment of a confederation and a federation

is shown most clearly in the history of German state treaties, and the history of United States state treaties.

(*b*) The remaining point of importance in connection with federation is responsibility for the state debt. It appears to me that in a case of federation, such as that of the United States, the rule of cession exactly applies. The federation is legally liable if it is expressly stipulated in the treaty, while the state ceases in any case to be liable. If this works injustice the states to which the creditors belonged must remedy the matter by diplomatic pressure. Direct action against the state is prohibited by the federation; direct action against the federation is not legally possible, and so recourse must be had to war or diplomacy. The only example, apparently, on record is the famous case of the admission of Texas, an independent Republic, into the United States in 1845. The resolution of Congress of 1st March, 1845, which offered annexation to Texas, and which was accepted by Texas, and so constituted the treaty of cession, provided that all the public land in Texas should be kept by her for the payment of the liabilities and debts of the Republic, but that in no event were such debts and liabilities to become a charge upon the United States. Later on the United States took over part of the lands, agreeing to pay ten million dollars, half to be retained till holders of Texas bonds should release their claims on her customs duties. Later on the Government undertook to reserve seven and a half million dollars to be paid *pro rata* among the bondholders in consideration of their releasing their claims. The claims of one of the bondholders was submitted to the mixed American and British Commission, established under the Convention of 8th February, 1853, to settle outstanding claims, but no decision was arrived at because the commissioners disagreed, and the umpire apparently decided that the claim did not fall under the terms of the Convention. It is not clear on what grounds he rested his decision, whether it was merely because the question had not been raised before diplomatically, or whether, as appears to be the case, he held that there was no liability at all on the United States (*cf.* United States Arbitrations, iv., 3593 *seq.*, with Wharton's account, i., 22, 23). The United States Commissioner said: "Whether the United States should be liable for this indebtedness I do not feel called on to decide. It is clear Texas is not exonerated from the debt, and the United States has manifested a strong disposition to bring about its adjustment." Further he stated: "Texas is still a sovereign state with all the rights and duties of Government, except that her international rights are controlled by the United States, and she has transferred to the United States her rights of duties on imports," and he seemed to consider any claim relative to the previous pledge to the bondholders of such duties to be limited to their value. The British Commissioner held that "the obligation of Texas to pay her debts is not in dispute, nor has it been argued that the mere act of her annexation to the United States has transferred her liabilities to the Federal Government, though, certainly, as regards foreign Governments, the United States is now bound to see that the obligations of Texas are fulfilled. It is the transfer of the integral revenue of Texas to the Federal Government that is relied on as creating the new liability."

These views are not exactly perspicuous, and different opinions have been taken of their effect. Huber (p. 169) concludes that the state remains undisturbed in its proprietary relations so far as the matters of the confederation are not directly concerned. Debts do not pass to the federation, and though the state loses its customs revenue it is usually saved a lot of expense in central administration. Debts for which it has given its customs as securities continue to be incumbent on it, but the creditors lose their security, as the federal customs are legally quite distinct from the customs which were pledged. Dana (Wheaton, para. 30, n. 18) holds that the United States were bound to pay up. It would not be sufficient to pay merely the proceeds of the customs, as the United States Commissioner had

suggested, since the proceeds were determined by the United States. "The truth is, by the annexation the United States changed the nature of the thing pledged, and is bound generally to do equity to the creditor." Westlake (i., 78) concurs in this view. Halleck (Part I., Chapter III, para. 28) says: "If one of the constituent parts, originally a separate state, should by the act of incorporation vest in the new sovereignty all its means of satisfying its debts and obligations, the new state would, even in the case of a new federal union, be bound to assume such debts and obligations to the extent of the means so transferred." On the other hand, he admits that if rights and obligations rest with the state the federation is not entitled to the one or responsible for the other.

The facts of the case remain that the United States did not pay Texas' debts, nor did they induce Texas to pay in full, nor did they ever consent to recognise any obligation on their part to pay. I do not think, therefore, that it is possible to maintain that, independently of treaty, any part of the debt of an incorporated state passes over to the federation. The situation is precisely the same as in the case of the cession by one state of itself to another state, resulting in incorporation. With regard to the state which joins the federation it does not seem possible to maintain that it has any legal liabilities in International Law. Despite the American Commissioner, no state can be sovereign whose international relations are in the hands of a federation, and if a state be not a sovereign it does not exist for International Law, and it is impossible to say that a debt is legally incumbent on that which has no existence. This will be seen more clearly by considering the case of cession, resulting in incorporation, where it is clearly impossible to say that the debt rests upon a unit which does not even maintain internal distinctness. The fact is that the duty resting on the federation to pay the debts of an incorporated state is a moral one, and cannot be elevated into a rule of International Law.

In the case of confederation, the state debt might very possibly continue to be incumbent on the confederated state, since that state remains to some extent an international personality.

In the case of the federation of groups of British colonies, which present features similar, though not identical, with those of federal unions of sovereign states, provision has always been made in the Imperial Acts authorising the federation as to the manner in which the existing debts of the separate colonies are to be met, and it need hardly be said that no British colony has made any effort to evade payment of her obligations. A question of some legal interest, however, arises in connection with the question how far the federation is bound by treaties which, prior to federation, had been adhered to by some or all of the members of the federation. For example, Queensland adhered to the Treaty between Great Britain and Japan, while the other colonies refrained, and the question may arise whether that adherence can still be deemed binding when Queensland is merely a state of the Commonwealth of Australia. The answer, if Queensland had been an independent state instead of a colony, would, on the grounds above urged, appear to be in the negative, but a distinction must probably be made in the case of a colony. For the legal position would appear to be that by adhering to the treaty on behalf of Queensland, His Majesty bound himself in respect of that territory, and that this obligation cannot be set aside by any mere alteration of the internal constitutional relations of the Australian colonies. There is also strong practical reason for upholding this view. In the case of an independent state which joins a federation, all the powers recognise that the federation will bear seriously on their interests by affecting treaty relations and modifying the balance of power, etc., and it is probably now, in view of the course of history, a rule of International Law that in the case of a proposed federation any power affected has a right to ask guarantees for its protection, without being deemed to have shown a hostile spirit

to the federation. If, therefore, it were held that by the federation of colonies the existing treaties to which the states were parties were abrogated, foreign powers with a fair show of right could claim guarantees whenever it was proposed to federate British colonies—an interference with the internal administration of the Empire, which must, if possible, be avoided. The reality of this danger may be proved, if need be, by the fact that one of the causes of the long delay in federating the Dominion of Canada appears to have been the jealousy felt by the United States to the prospect of a united body of states being substituted for the weak and divided Governments of the several provinces.

CHAPTER XII.

STATE SUCCESSION IN THE CASE OF THE BREAKING UP OF A STATE.

We have considered cases of the separation of one state from another as being, according as such separation is recognised by treaty with the parent state or not, cases of cession or conquest, and as falling under the rules for cession or conquest. There remain for consideration only cases where (i.) a state breaks up so completely that no part of it represents the original state; or (ii.) a federation or a confederacy dissolves.

(i.) The states obviously have no real succession in the sense of a universal succession. Each part takes such territory as it can grasp. Similarly, none of them can claim any treaties of the original state as, obviously, all would be equally entitled to do so, and a splitting up of a contractual obligation cannot conceivably be binding on the other party. Huber (p. 174) here, as usual, desires to distinguish between personal and territorial treaties, and Hall (p. 92) says that "a new state formed by separation is bound by local obligations and has local rights secured by treaty, such as the duty of keeping clear the course of a stream or of levying not more than a certain amount of dues, and the right of navigating a river beyond the limits of its own territories." There is absolutely no authority in practice for this statement, and it has been already argued that it is not at all obvious that it is ultimately possible to distinguish between a local and a personal treaty. All treaties are personal, and the local relation is not really in point. One of the parties is gone, and with it the treaty. New treaties may be made instead or the existing treaties may be tacitly renewed by being acted upon.

With regard to the property of the state it is obvious that, apart from convention, each party takes what is locally its own. In cases of convention there can be either adopted that basis—the territorial principle, as Huber calls it—or a liquidation can be made of all assets, or part of the assets can be liquidated and part appropriated on the territorial system. The chief examples of liquidation are those of Westphalia, of 29th July, 1842, and of Frankfurt of 2nd July, 1828, but the details are of no theoretic interest.

Of more importance is the question: What is to be done with the debt of the divided state? There is here a remarkable consensus of opinion. Grotius (Book II., Chapter IX., para. 10) says when a state breaks up "*si quid commune fuerit id aut communiter est administrandum aut pro ratis portionibus dividendum*"; so Puffendorff (Book VIII., Chapter XII., para. 5); Kent (i., 27); Heffter (p. 63); Halleck (vol. i., Chapter III., para. 27): "The obligations which had accrued to the whole before the division are, unless they have been the subject of a special agreement, rateably binding upon the different parts." Phillimore (i., para. 137); Bluntschli (para. 59); Calvo (i., para. 106); Pradier-Fodéré (i., 279); Rivier (i., 70); Fiore (i., 226); Gabba (p. 337); Appleton (p. 64); Huber (p. 179): "The question if the general state debts of the extinguished state must be divided is in recent international science and practice never denied. The mere succession transfers to each successor a quota of the debts, the only question is, how much?"; and Hall (p. 93, n.), where he admits the theory for the case of a state so split up that no one of the fractions represents the original state; so also others.

It is difficult to conceive a greater consensus of authority, but it is necessary to remark that this is the case to which Hall's dictum applies, that writers of International Law "are incomplete and tend to copy one another." I have been unable to discover any evidence for the rule except in the case of special treaty

arrangements. There is no recent practice to show what would happen if a state broke up into two fragments, both not representing the real state. I am inclined to think that neither would be under any legal objection to meet the debt of the old state. Hall here seems inconsistent; he admits that in the case where a state breaks up so that one part remains representative of the old state that part alone is responsible for the general debt—"the fact remains that the general debt of a state is a personal obligation"—yet he accepts the theory of partition for a total break-up. But if neither represents the person who contracted, how can either be bound? The rule appears to be a mere moral ideal without foundation in law, and it is doubtful, should, for example, Russia break up into fragments, to what extent it would be followed in practice.

In the case of a breaking-up of a country, either peaceably or by stress of outward force, stipulations may be laid down as to the division of debts. For example, in 1815 Russia and Austria, when partitioning the Duchy of Warsaw, took over the debts and assets in the proportion of eight to one, and Prussia and Russia similarly divided the debts of their shares of Poland. Other examples—the liquidation between Frankfurt and Hanau, 14th March, 1814, and the liquidation of Frankfurt, 2nd July, 1828—are cited in Huber (p. 298), who considers that such divisions should be according to the taxable values of the parts separated, but to argue from these special cases to a general rule applicable to a case where there is no treaty and the parts are violently separated is almost absurd.

Huber carries out logically the principle which he has laid down into all details. A guarantee passes over rateably to the successors, pensions must be paid, officers must be taken over or pensioned, past service must be counted in reckoning pensions (p. 184), and so on. All this cannot conceivably be regarded as law, and parts of it would certainly not be carried out by any state apart from convention. Bluntschli (para. 55), in accordance with his theory that state succession rests on the identity of the people and the land, lays it down that immovables destined to public purposes pass to the party on whose territory they are situated, who, however, must contribute a sum to the other party if that party used to use those immovables, and is compelled to incur expense to meet his needs. Arms, etc., should be divided according to the number of the population in the new states. The *domaine privé* should be divided like the public domain, immovables remaining in the possession of the territorial lord, but an allowance being made for them.

The absurdities which result from the detailed consideration of the matter supply a strong argument against the correctness of the theory of universal succession. It is far simpler to assume that the state which is extinguished is finally disposed of, and that the new states which arise are merely successors as following it, not in any way as continuing its existence. It may fairly be anticipated that if a state, overburdened by a huge load of debt, broke up into fragments, nothing but armed force could compel those fragments to assume the burden of debts which had proved too heavy for the original state to bear.

(ii.) In the case of the breaking-up of a confederate or federal union, or of a real union, such as Norway and Sweden or Austria and Hungary, there would, on my theory, be no legal passing over of the duties or rights of the conferation or federation to the members. The only cases, however, recently existing were cases where an agreement was made before the breaking-up, which determined the right of the members as to property. Inevitably the treaties of the real or confederate union must fall away with the disappearance of the person. According to Huber (p. 186) this applies only to treaties of high politics, which become capable of denunciation through changes in their circumstances, and to treaties which are indivisible and can only be exercised by the united states, such as treaties of alliance or subsidy. Commercial treaties, postal treaties, and similar agreements continue to bind both states. This must be regarded as very doubtful. The other party can surely say that if the treaty is altered by the substitution of

two parties for one he can withdraw from it. This is brought out by the actual facts in the case of Norway and Sweden. Both powers notified foreign Governments that each was prepared to perform, as far as itself was concerned, the stipulations in treaties made by the union with these foreign powers, but that, of course, it could not answer for the actions of the other party to the original union. The attitude taken up by the British Government, and, it is believed, by most foreign Governments, is to accept for the time being the offer made by Sweden and Norway to continue on the old basis. But it appears that Sweden and Norway in their offer, and Great Britain in its acceptance, have expressly reserved the right, while leaving things at present in the *statu quo*, to reconsider the treaties, and it has been stated in Parliament (*Hansard*, 4th series, cxlviii., 384; clxvi., 296, 297), that His Majesty's Government have under consideration the question as to their position with regard to the Treaty with France of 1855, guaranteeing the possessions of Norway and Sweden against Russian aggression, a guarantee which obviously becomes exceedingly difficult to fulfil unless Norway and Sweden can guarantee the adoption of a common foreign policy as against Russia.

The position, therefore, is that Great Britain, Norway, and Sweden have renewed by mutual consent their existing relations, but that all parties have expressly repudiated the idea that they are *ipso jure* bound by the existing treaties, a view which corresponds exactly with the theory of singular succession, but not with that of universal succession. It may also be remarked that after the breaking-up of the German Confederation the North German Confederation, even with the consent of the South German states and Austria, could not exercise the right of keeping a garrison in Luxembourg possessed by the German Confederation. This seems to prove clearly that there is no succession to the treaties of a confederation by the members thereof.

The legislation of the confederation, federation, or real union goes, of course, as far as it exists, to the ground, without affecting rights already fully enjoyed. This was the case with the legislation of the old German Confederation, while Norway and Sweden had no common Legislature.

The case of the North German Confederation of 1866 to 1871 does not present an instance of the breaking-up of a federal union. There was no breaking-up at all, else all the treaties of the confederation could not have passed over to the new empire without novation, nor could the debts of the confederation have fallen direct to the new empire. What really happened was merely the expansion, by the addition of new members, of an existing confederation, whose juristic personality was no more altered by such expansion than the personality of a company by the creation of new classes of shareholders. On the other hand, the North German Confederation of 1866 to 1871 is not a successor of the German Federation of 1820 to 1866. The treaties of the latter did not pass over to its successor; its legislation ceased to have any effect; there was no immediate succession to its property, which, so far as it consisted of movables, was left undivided by treaty, and administered in Maintz by the North German Union for the general purpose of German defence, while Luxembourg's share was paid off in cash.

In the case of the old German Empire, which dissolved in 1805, the treaty relations of the empire disappeared without a successor; but its legislation, so far as it had in the several parts of the empire the force of local law, remained valid until the civil law of Germany was codified by the Imperial Legislature. The assets of the old empire were liquidated under treaty.

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CONCLUSION.

In view of the facts detailed in the preceding chapters, it is submitted that instead of assuming the existence of a law of universal succession in virtue of which a successor succeeds to all the rights and liabilities of a predecessor in the case of cession or annexation, it is at once simpler in theory and more consonant with practice to assume that there is what may be called a singular succession, by which is meant a succession to or taking possession of the rights alone of the predecessor, so far as these rights can be enforced in the courts of the successor, but that the successor does not succeed to any of those rights which exist only at International Law, or which require for their assertion legal action beyond the limits of the successor's jurisdiction. The doctrine has, no doubt, not the logical completeness of the doctrine of universal succession, and as it negates all succession to liabilities it is open to criticism on ethical grounds. But it must be remembered that as the origin of cession or annexation normally lies in the exercise of armed force, it cannot *à priori* be expected that the doctrine of state succession should be ethically satisfactory or logically consistent. The supporters of the view of universal succession are compelled to admit that in fact the universal succession frequently does not occur. I think it is simpler and more true to assume that there is no such universal succession, and to explain the cases in which such succession does appear to occur as resting on grounds of treaty, stipulation, ethics, or expediency. At least this seems to me the only possible principle which renders intelligible the action of His Majesty's Government with regard to the recent annexations, and explains the technical law of English law discussed in Chapter III. above, which forbids an action to be brought on account of a matter arising out of an act of state.

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